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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

1963

No. 20240

UNITED STATES OF AMERICA,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

(April 9, 1963)

CERTIFIED QUESTION TO THE SUPREME COURT OF THE UNITED STATES AND ACCOMPANYING PAPERS.

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ROSS R. BARNETT and PAUL B. JOHNSON, JR.

CERTIFIED QUESTION FROM THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before TUTTLE, Chief Judge, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

PER CURIAM: The above members of the Court of Appeals for the Fifth Circuit, sitting en banc, being evenly divided in their opinion as to the correct answer to a question of law arising in this cause, and the Court, desiring instruction concerning it for the proper decision of the cause which is now pending before the Court, hereby certifies the following question to the United States Supreme Court:

Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress, are such persons entitled, upon their demand, to trial by jury for the criminal contempt with which they are charged?

A statement of the nature of the cause and of the facts on which the certified question arises and separate opinions of the members of the court follow.

A statement of the nature of this cause and of the facts on which the certified question arises, as required by Supreme Court Rules 28-29 follows:

The case presents the certified question of law relating to criminal contempt arising out of the case of *James H. Meredith, et al v. Charles Dickson Fair, et al.*, No. 19475. This Court in the opinion of June 25, 1962, in *Meredith v. Fair*, 5 Cir., 1962, 305 F. 2d 343, cert. denied, 1962, — U. S. —, 83 S. Ct., 49, — L. Ed 2d —, reversed the decision of the District Court and remanded it with directions.[1]

[1]On January 12, 1962, this Court at 298 F. 2d 696 affirmed the denial of the preliminary injunction by the District Court and

Thereafter on July 27, 1962, this Court by opinion and order at 306 F. 2d 374, took further action. After setting aside a stay of execution of this Court's mandate pursuant to 28 USCA § 2101 (f) by one of the Judges of this Court, the Court then directed that its mandate be recalled and amended in order to make "explicit the meaning that was implicit in this Court's conclusions as expressed throughout its opinion in this cause dated June 25, 1962." 306 F. 2d 374, 378. The opinion then prescribed the terms of the amended mandate and order. The case was reversed and remanded with directions to the District Court "to grant all relief prayed for * * * and to issue forthwith a permanent injunction against each and all of the defendants-appellees * * * enjoining and compelling each and all of them to admit * * * Meredith, to the University of Mississippi * * *. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi. * * *." This Court then said it would order its own injunction in these terms:

> "Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi, this Court here-

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issued the Court's mandate forthwith to permit an early trial on the merits. On February 12, 1962, at 305 F. 2d 341, the Court denied Meredith's application for a preliminary injunction pending appeal from the denial of injunctive relief by the District Court following trial on the merits.

with issues it own preliminary injunction enjoining and compelling each and all of said parties to admit plaintiff-appellant to, and allow his continual attendance at the University of Mississippi, further prohibiting and preventing said parties or any of them from excluding said plaintiff-appellant from attendance to and continued attendance thereafter on the same basis as other students at the University of Mississippi." 306 F. 2d 374, 378.

2. On July 28, 1962, a formal order was entered by this Court in like terms to effectuate the amended mandate and orders to the District Court and providing for the preliminary injunction issued by this Court. This order was also stayed, but on August 4, 1962, this Court vacated the stay or stays granted on July 28 and July 31, 1962.[2]

This order likewise being stayed, the matter was presented by Meredith to Mr. Justice Black, Circuit Justice, who on September 10, 1962, vacated all of these stays with the further order "that the judgment and mandate of the Court of Appeals shall be effective immediately" and "pending final action by this Court on the petition for writ of certiorari" the "respondents be, and they are hereby, enjoined from taking any steps to prevent enforcement of the United States Court of Appeals' judgment and mandate."[3] ___ U. S. ___, 83 S. Ct. 10, ___ L. Ed. 2d ___, 7 Race

[2]Per Curiam opinion August 4, 1962, not yet reported, see Race Relations Law Reporter, Volume 7, Fall 1962, p. 743. The most complete report of the actions and orders taken in connection with this matter is in Volume 7 of Race Relations Reporter; Citations are, therefore, generally to this report.

[3]On September 13, 1962, the District Court entered its injunction reciting that "This matter is now before this Court by virtue of the mandate of the United States Court of Appeals for the Fifth Circuit and the mandate of Mr. Justice Black of Septem-

Relations Law Reporter, Fall 1962, p. 745.

3. On September 18, 1962, this Court (Judges Brown, Wisdom and Bell), after first ascertaining from the District Court that it declined to enter an order in this form, entered its order allowing the United States to appear in the case. The order recited "It appearing from the application of the United States, filed this day, that the interests of the United States in the due administration of justice and the integrity of the processes of its courts should be presented in these proceedings * * *," the order then prescribed:

> "It is ordered that the United States be designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before this Court and by reason of the mandates and orders of this Court of July 27, 28, 1962, and subsequently thereto, also before the District Court for the Southern District of Mississippi to accord each court the benefit of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States."[4]

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ber 10, 1962, setting aside all stays * * * and putting into effect the mandates of the Court of Appeals for the Fifth Circuit * * * of July 17, 1962, July 27, 1962 and * * * its final order of August 4, 1962 * * *." Race Relations Law Reporter p. 746.

[4]Also published 7 Race Relations Law Reporter, P. 748.

4. On September 20, 1962, the United States filed an application for further injunctive orders. This verified petition brought to the attention of this Court the fact that on September 19, 1962, in *Meadors et al v. James Meredith et al*, the Chancery Court, Second District, Jones County, Mississippi, Cause No. 19365, had issued its injunction against Meredith, the Board of Trustees, various University officials, the United States Department of Justice, the Federal Bureau of Investigation, the Office of the Attorney General of the United States, and all United States Marshals and Deputy Marshals. The order of the State Court enjoined and prohibited such persons "from doing anything or performing any act, the execution of which is intended to enroll and register the Negro, James Meredith, as a student in the University of Mississippi; * * *."[5]

The Government's application also advised the Court of the enactment by the Mississippi Legislature approved by the Governor of Mississippi Senate Bill No. 1501, the effect of which made it a criminal offense for a person to "* * * attempt * * * to enroll in any of the institutions" of higher learning specified in the Act.[6] The application likewise informed the Court of the action of the Justice of the Peace Court in Jackson, Mississippi, on September 20, 1962.

On September 20, 1962, this Court (Circuit Judges Brown, Wisdom and Bell) entered its further injunctive order. It recited that "This matter is now before this Court on Petitions for Orders supplementing this Court's Order of July 28, 1962, to (1) restrain the enforcement of S.B.

[5]This injunction is reported at 7 Race Relations Law Reporter p. 749.

[6]See 7 Race Relations Law Reporter, p. 750.

1501 * * *; (2) restrain any compliance with or enforcement of the injunction issued by the Chancery Court of Jones County, Mississippi, dated September 19, 1962 * * *; (3) restrain the arrest of James Meredith on a conviction had in the Justice of the Peace Court in Jackson, Mississippi, on September 20, 1962 * * *." The court further recited that it "appearing that S.B. 1501; the aforesaid injunction issued by the State Court and the conviction of James Meredith each constitute an interference with and obstruction of this Court's injunction of July 28, 1962." This Court thereupon ordered "that the appellees-respondents, their agents, employees and persons acting in concert with them or persons having actual notice of this order, including law enforcement and public officials in Mississippi, State, County and Municipal * * *" were enjoined and restrained from "(1) enforcing * * * the provisions of S.B. 1501 against James Meredith, or any other persons * * *. (2) taking any steps to effectuate the conviction and sentence on September 20, 1962, in the Justice of the Peace Court in Jackson, Mississippi * * *; or arresting him or any other persons including federal officials or taking * * * any other action which has the purpose or effect of interfering with the enrollment of James Meredith * * *. (3) taking or refraining from taking any action to comply with or to enforce the injunction issued by the Chancery Court of Jones County, Mississippi, on September 19, 1962 * * *." The order concluded with this paragraph: "(4) This order is not intended to limit the authority of the District Court to proceed with respect to the matters referred to in paragraphs (1) and (2) of this order.[7]

[7]The order is published in 7 Race Relations Law Reporter, p. 752.

5. On September 21, 1962, the United States, amicus curiae, filed an application seeking an order to show cause why the Board of Trustees and certain administrative officials of the University should not be held in civil contempt.

This Court (Circuit Judges Brown, Wisdom and Bell) on September 21, 1962, entered its show cause order. The order recited that it "appearing from the application of the United States, *amicus curiae*, filed this day, that each of the defendants above named has failed and refused to comply with the terms of this Court's order of July 28, 1962, and are presently persisting in such failure and refusal * * *." Thereupon the Court ordered that the named trustees "appear personally before this Court on September 24, 1962, at 11 a.m. o'clock in the Courtroom of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, to show cause, if any they have, why they should not be held in civil contempt." The order went on to provide, however, that since the Court was advised that the District Court had ordered the named University administrative officials to show cause and that a hearing on the alleged contempt was then fixed for hearing in the District Court for that day (September 21, 1962), the application to that extent was denied.*

6. On September 22, 1962, this Court (Circuit Judges Brown, Wisdom and Bell) entered its further show cause order. The order recited that it "* * * appearing from the verified petition of the United States of America that [the named administrative officials of the University of Mis-

*The District Court on September 21, 1962, after hearing found each of the University officials not guilty and discharged the contempt proceedings. 7 Race Relations Law Reporter 754.

sissippi] together with the other respondents named in this Court's order of September 21, 1962, have failed and refused, and are now failing and refusing, to comply with this Court's order of July 28, 1962, * * * by failing and refusing to enroll and register, and admit to continued attendance at the University of Mississippi, James Howard Meredith * * *." The Court thereupon ordered the named administrative officials "be made additional respondents to the show cause order of this Court of September 21, 1962, and that they show cause, if any they have, on September 24, 1962 * * *" at New Orleans why they should "not be held in civil contempt by reason of their failure and refusal to obey the order of this Court of July 28, 1962, and the other orders of this Court requiring the respondents to register and enroll and admit to continued attendance at the University of Mississippi James Howard Meredith."

7. By a majority vote of all of the active Judges, this Court convened (Judge Cameron absent on account of illness) en banc for the hearing of September 24, 1962, at New Orleans. On that hearing the Court heard extensive testimony bearing upon actions of the Board of Trustees, the administrative officials of the University, Governor Ross Barnett and other governmental officials showing that up to that time Meredith although he had presented himself for admission, had not been admitted to the University as previously ordered by this Court. This evidence included the fact of the Board of Trustees' resolution of September 20, 1962, by which the Board invested Governor Barnett "with the full power, authority, right and discretion of this Board to act upon all matters pertaining to or concerned with the registration or non-registration, admission or non-admission and/or attendance or non-attendance of James

H. Meredith * * * and that a certified copy of this Resolution together with copies of the conflicting injunctions of Honorable S. C. Mize dated September 13, 1962, and Chancellor L. B. Porter dated September 19, 1962 previously served upon the members of this Board, be furnished to the Governor * * * for such course of action as the Governor shall deem legal, fit and proper in the premises."* The evidence also included the Governor's published television speech to the people of Mississippi which included the following statement:

> * * * Therefore, in obedience to legislative and constitutional sanction, I interpose the rights of the Sovereign State of Mississippi to enforce its laws and regulate its internal affairs without interference on the part of the Federal Government or its officers and, in my official capacity as Governor of the State of Mississippi, I hereby make this proclamation:
>
> —Whereas, the United States of America consists of fifty Sovereign States bound together basically for their common welfare; and
>
> —Whereas, the Constitution of the United States of America provides that each state is sovereign with respect to certain rights and powers; and
>
> —Whereas, pursuant to the 10th Amendment to the Constitution of the United States, the powers not specifically delegated to the Federal Government are reserved to the several states; and

*This resolution is published at 7 Race Relations Law Reporter 753.

—Whereas, the operation of the public school system is one of the powers which was not delegated to the Federal Government, but which was reserved to the respective states pursuant to the terms of the 10th Amendment; and

—Whereas, we are now face to face with the direct usurpation of this power by the Federal Government through the illegal use of the judicial decree:

Now, therefore, I, Ross R. Barnett, as Governor of the Sovereign State of Mississippi, by authority vested in me, do hereby proclaim that the operation of the public schools, universities and colleges of the State of Mississippi is vested in the duly-elected and appointed officials of the State of Mississippi and I hereby direct each of said officials to uphold and enforce the laws duly and legally enacted by the Legislature of the State of Mississippi, regardless of this unwarranted and illegal and arbitrary usurpation of power; and to interpose the State Sovereignty and themselves between the people of the state and any body-politic seeking to usurp such power.

In the course of that hearing the President of the Board of Trustees of Higher Learning announced in open court on behalf of himself and the 12 members of the Board "that the Board was now ready and willing to fully perform all things ordered and directed by the former orders of this Court * * *." Likewise, the Registrar of the University of Mississippi "announced in open court that he would be

available in Jackson, Mississippi, not later than 1:00 p.m. on September 25, 1962, for the purpose of registering and admitting as a student * * * James H. Meredith in accordance with the orders of this Court * * *."

8. At the conclusion of the hearing, the Court en banc entered its order of September 24, 1962.[10]

After reciting the statements by the President of the Board of Trustees and the Registrar quoted in the preceding paragraph, the Court ordered the respondents to "fully and completely comply with all of the terms of the order of this Court dated July 28, 1962, including, but not limited to * * *" specific actions described in subparagraphs a, b, c, d, e. Subparagraph (b) required that the Board "revoke and rescind the action of the Board taken on September 20, 1962, appointing Ross R. Barnett, * * * as the agent of the Board to act upon all matters pertaining to the registration and admission of James H. Meredith." Subparagraph (d) required the Board to instruct the University officials "to register and receive James H. Meredith for actual admission * * *" and attendance at the University. Subparagraph (e) required that the Registrar "be available at Jackson, Mississippi, at the office of the * * * Board of Trustees, at the hours therein specified on September 25, 1962, for the purpose of the registration of the said James H. Meredith and his actual admission to, and the continued attendance thereafter at, the University. The order required counsel for the respondents to advise the Court by 6:00 p.m., Sep-

[10]The order is published in full at 7 Race Relations Law Reporter 755.

tember 25, 1962, as to the actions taken to comply with this order.

9. On the evening of September 24, 1962, the Government presented to this Court an application for a temporary restraining order against the State of Mississippi, Ross R. Barnett, Governor, the Attorney General, the Commissioner of Public Safety, two District Attorneys, various Sheriffs, Chiefs of Police, and all Sheriffs of the Counties of Mississippi. At 8:30 o'clock a.m., September 25, 1962, this Court (Chief Judge Tuttle, Circuit Judges Rives and Wisdom) entered its temporary restraining order.[11] That order recites that it "appearing from the verified petition of the United States, amicus curiae * * * that the State of Mississippi, Ross R. Barnett, Governor [and the others mentioned] * * * threatened to implement and enforce, unless restrained by order of this Court, the provisions of a Resolution of Interposition * * *, the provisions of § 4065.3 of the Mississippi Code, and a proclamation of Ross R. Barnett invoking the doctrine of Interposition * * *; that Paul G. Alexander has instituted two criminal prosecutions against * * * Meredith on account of the efforts of * * * Meredith to enroll in the University * * * pursuant to the orders of this Court; that A. L. Meador, Sr. * * * on September 19, 1962, instituted in the Chancery Court of the Second Judicial District of Jones County, Mississippi, a civil action against * * * Meredith to prevent him from attending the University * * *; that on September 20, 1962, James Howard Meredith, while seeking to enroll at the University * * * in Oxford, Mississippi, pursuant to the orders of this Court, was served with a writ of injunction issued by the Chan-

[11] This restraining order is set out at length in 7 Race Relations Law Reporter 756.

cery Court of Lafayette County, Mississippi at the instance of Ross R. Barnett, enjoining James Howard Meredith from applying to or attending the University of Mississippi; that on September 20, 1962, the State of Mississippi enacted Senate Bill 1501, the effect of which is to punish James Howard Meredith should he seek enrollment in the University * * *." The Court proceeded to find that "the effect of the conduct of the defendants herein named in implementing the policy of the State of Mississippi as proclaimed by Ross R. Barnett will necessarily be to prevent the carrying out of the orders of this Court and of the District Court for the Southern District of Mississippi; and that the acts and conduct of the defendants named in the petition will cause immediate and irreparable injury to the United States consisting of the impairment of the integrity of its judicial processes, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the United States * * *." On the basis of this, the Court entered its temporary restraining order as to the State of Mississippi, Ross R. Barnett, the Attorney General and others restraining them from:

> 1. Arresting, attempting to arrest, prosecuting or instituting any prosecution against James Howard Meredith under any statute, ordinance, rule or regulation whatever, on account of his attending, or seeking to attend, the University of Mississippi;
>
> 2. Instituting or proceeding further in any civil action against James Howard Meredith or any other persons on account of James Howard Mere-

dith's enrolling or seeking to enroll, or attending the University of Mississippi;

3. Injuring, harassing, threatening or intimidating James Howard Meredith in any other way or by any other means on account of his attending or seeking to attend the University of Mississippi;

4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty.

IT IS FURTHER ORDERED that Paul G. Alexander and J. Robert Gilfoy be temporarily restrained from proceeding further, serving or enforcing any process or judgment, or arresting

James Howard Meredith in connection with the criminal actions against him in the justice of the Peace Court of Hinds County, Mississippi.

IT IS FURTHER ORDERED that A. L. Meador, Sr., be temporarily restrained from taking any further action or seeking to enforce any judgments entered in the case of A. L. Meador, Sr., v. James Meredith, et al.

IT IS FURTHER ORDERED that Ross R. Barnett be temporarily restrained from enforcing or seeking to enforce against James Howard Meredith, any process or judgment in the case of State of Mississippi, Ex Rel Ross Barnett, Governor v. James H. Meredith.

10. Later that same night, September 25, 1962, this Court (Circuit Judges Rives, Wisdom and Gewin) entered an order requiring Ross R. Barnett to appear "personally before this Court on September 28, 1962, at 10:00 o'clock in the Courtroom of the United States Court of Appeals for the Fifth Circuit, * * * New Orleans, Louisiana, to show cause, if any he has, why he should not be held in civil contempt of the temporary restraining order entered by the Court this day."[12]

This order recited the matters occurring in open court on September 24, and the orders heretofore described issued to the Board of Trustees and the administrative officials of the University and the issuance earlier that day of the temporary restraining order. The order then recited that

[12]This order is reported at 7 Race Relations Law Reporter 759.

it "appearing from the verified application of the United States, amicus curiae herein, that on the afternoon of this day Ross R. Barnett, having been served with a copy of the temporary restraining order * * * having actual knowledge of the terms of that order, deliberately prevented James H. Meredith from entering the office of the Board of Trustees in Jackson, Mississippi at a time when James H. Meredith was seeking to appear before Robert B. Ellis in order to register * * * and that by such conduct Ross R. Barnett did willfully interfere with and obstruct James H. Meredith in the enjoyment of his rights under this Court's order of July 28, 1962, and did willfully interfere with and obstruct Robert B. Ellis in the performance of his obligations under this Court's order of July 28, 1962, all in violation of the terms of the temporary restraining order entered by the Court this day."

11. On the next day, September 26, this Court (Circuit Judges Rives, Brown and Wisdom) entered a similar order to show cause addressed to Lieutenant Governor Paul B. Johnson, Jr. fixing the time of hearing for Saturday, September 29, 1962, at New Orleans.[13]

This order recited that it "appearing from the verified application of the United States, amicus curiae herein, that Paul B. Johnson, Jr. * * * after receiving actual and constructive notice of the terms of this Court's temporary restraining order of September 25, 1962, and while acting in concert and active participation with Ross R. Barnett, * * * prevented James H. Meredith from entering the campus of the University of Mississippi * * * and did thereby

[13]This order is published at 7 Race Relations Law Reporter 760.

prevent James H. Meredith from enrolling in and attending the University * * *" and with the purpose of interfering with this Court's previous orders.

12. On September 28, 1962, this Court sitting en banc (Judge Cameron not sitting) heard the order to show cause as to Ross R. Barnett. It heard witnesses in open court including documentary evidence consisting of moving picture newsreel pictures of the occurrences by Ross R. Barnett during the efforts of James H. Meredith to enter the offices of the University of Mississippi at Jackson, Mississippi, for the purpose of registering and attending the University. This evidence included a copy of the terms of the Governor's proclamation addressed to James H. Meredith on September 25, 1962.[14] It proclaimed:

> I, Ross R. Barnett, Governor of the State of Mississippi, having heretofore by proclamation, acting under the police powers of the State of Mississippi, interposed the sovereignity of this State on September 20, 1962, denied to you, James H. Meredith, admission to the University of Mississippi under such proclamation and for such reasons, do hereby finally deny you admission to the University of Mississippi.

At the conclusion of these hearings on September 28, the Court entered its order, findings of fact and conclusions of law and judgment of civil contempt.[15]

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[14]This proclamation is published in 7 Race Relations Law Reporter 759.

[15]This order is set out in full in 7 Race Relations Law Reporter 761. Petition for writ of certiorari as to this order was denied by the Supreme Court in February, 1963, — U. S. —, — U. S. L. W. —.

The order recited that though required to appear in person, Ross R. Barnett failed to appear or respond in person or by counsel, but that upon hearing the evidence, it made its findings of fact based thereon, as follows:

1. Since this Court entered its order of July 28, 1962, and the District Court for the Southern District of Mississippi entered its order on September 13, 1962, requiring the admission of James H. Meredith to the University of Mississippi, Ross R. Barnett, as Governor of the State of Mississippi, has issued a series of proclamations calling upon all officials of the state to prevent and obstruct the carrying out of the Court's orders with respect to the admission of James H. Meredith to the University. Two of these proclamations were issued by Ross R. Barnett on September 24 and September 25, 1962.

2. On September 25, 1962, this Court entered its temporary restraining orders restraining Ross R. Barnett from interfering with or obstructing in any manner or by any means the enjoyment of rights or the performance of obligations under this Court's order of July 28, 1962 and the order of the District Court of September 13, 1962.

3. At approximately 4:30 P.M. on September 25, 1962, Ross R. Barnett, having full knowledge of the existence and terms of this Court's temporary restraining orders, went to the office of the Board of Trustees of Institutions of Higher Learning to Jackson, Mississippi at a time when James

H. Meredith was due to appear at the office to be enrolled as a student in the University of Mississippi, pursuant to the order of this Court. When James H. Meredith arrived at the office and sought to enter for the purpose of enrolling, Ross R. Barnett deliberately prevented him from entering and told him that his application for enrollment was denied by Ross R. Barnett.

4. On September 26, 1962, James H. Meredith sought to enter the campus of the University of Mississippi in Oxford, Mississippi. He was prevented from entering by Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Ross R. Barnett.

5. The conduct of Ross R. Barnett in preventing James H. Meredith from enrolling as a student in the University of Mississippi has been with the deliberate and announced purpose of preventing compliance with the orders of this and other federal courts.

On the basis of these findings, this Court concluded that "Ross R. Barnett is in contempt of the temporary restraining orders entered by this Court on September 25, 1962," and it thereupon "ordered, adjudged and decreed that: Ross R. Barnett is in civil contempt * * *; that such contempt is continuing; * * *," and thereafter civil sanctions were imposed in the following terms:

* * * Ross R. Barnett shall be committed to and

remain in the custody of the Attorney General of the United States and shall pay a fine to the United States of $10,000 per day unless on or before Tuesday, October 2nd, 1962 at 11:00 A.M. he shows to this Court that he [is] fully complying with the terms of the restraining orders, and that he has notified all law enforcement officers and all other officers under his jurisdiction or command:

> (a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;
>
> (b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students.

Judge Jones, Gewin and Bell dissented from that part of the judgment imposing a fine upon Governor Barnett.

13. On Saturday, September 29, 1962, this Court (Circuit Judges Rives, Brown and Wisdom) heard the order to show cause addressed to Lieutenant Governor Paul B.

Johnson, Jr., and after hearings and findings of fact entered its order holding Paul B. Johnson, Jr. in contempt and imposing civil sanctions.[16] This order and the sanctions imposed were stated as follows:

> Paul B. Johnson, Jr. is in civil contempt of the temporary restraining order of this Court entered on September 25, 1962 upon application of the United States, amicus curiae, that such contempt is continuing and that Paul B. Johnson, Jr. shall pay a fine to the United States of $5,000.00 per day unless on or before October 2, 1962 at 11:00 A.M. he shows to this Court that from and after the time of the issuance of this order he has been, and is, in full compliance with the terms of the restraining order, that he intends to do so in the future and that he will, during any periods of time that he is acting for on on behalf of, or in the name, place and stead of, or with the authority or power of, or as Governor of the State of Mississippi, notify all law enforcement officers and all other officers under his jurisdiction or command:
>
> > (a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;
> >
> > (b) To maintain law and order at and around the University and to cooperate

[16]This order is published at 7 Race Relations Law Reporter 762.

with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith shall be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students.

In the event that Paul B. Johnson, Jr., while acting for, or on behalf of, or in the name, place or stead of, or with the authority or power of, or as Governor of the State of Mississippi fails at any time to take steps set forth in sub-paragraphs (a) and (b) he shall, on a finding of such fact by the Court, be committed to the custody of the Attorney General and shall pay a fine to the United States of $10,000.00 per day, such daily fine and imprisonment to continue during such period as he fails to purge himself of such contempt.

14. On October 2, 1962, pursuant to the time fixed in the contempt order of September 28, 1962, Governor Ross R. Barnett appeared before this Court through his counsel. In answer to questions from the Court, counsel stated that Governor Barnett was in full compliance with the Court's orders and would fully comply with the orders of the Court in the future to the extent to which he was able to do so. Upon this representation being made, the matter was continued until October 12, 1962, for further hearing before the Court en banc.

15. On October 12 in New Orleans the Court en banc (Judges Hutcheson and Cameron not sitting) held a further hearing on whether Governor Ross R. Barnett and Paul B. Johnson, Jr. had purged themselves. Submitted also was the motion filed by the State of Mississippi to dissolve the temporary restraining order and to dismiss the pending contempt proceedings. In connection with the question of whether he had purged himself of the civil contempt as previously adjudged, Respondent Barnett did not appear in person on October 12, but again he appeared by counsel. Counsel offered no proof, either by affidavit, oral testimony, or otherwise, bearing on the conduct of respondent following the contempt judgment. However, on that date counsel for Governor Barnett retracted their statements that Governor Barnett intended in the future fully to comply so far as he was able with the orders of the Court. Moreover, on October 19th Governor Barnett filed a response through his counsel to which he attached a statement which he had publicly delivered on October 17. The substance and effect of this statement, and thus the substance and effect of Respondent's posture before this Court is that Governor Barnett will, and must, reserve the right to determine whether compliance with, and enforcement of, this Court's orders are consistent with his duties, rights and obligations as Governor of the State of Mississippi.[17]

[17]The full statement follows:

I have never taken the position that I have purged myself, nor have I authorized anyone to take such a position on my behalf. My position is that I have upheld the law and am not in contempt of any Court.

It is my position that my first obligation, as the Governor of Mississippi, is to my oath of office to uphold the Constitution and Laws of Mississippi and the Constitution of the United States, and to preserve law and order. The people of Mississippi built this University and their schools at great sacrifice. These properties and their control belong to the State, and

However, the record shows that he did, in fact, between the contempt order of the Court on September 28, 1962, and the hearing on October 2, 1962, cease the physical resistance to the order of the Court directing the admission of James H. Meredith as a student at the University, which he had previously interposed personally and through other state officials. On the 30th day of September, 1962, the

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the Supreme Court of the United States has expressly so ruled in Waugh v. University of Mississippi, 237 U. S. 589.

All of the actions that I have taken were taken because of my duty to obey my oath as Governor, and as long as I am the Governor of this State, all actions that I will take in the future will be in obedience of this oath.

I conscientiously believe that it is my duty, as Governor, deliberately, solemnly, and fully, and free from the control or interference of anyone to exercise, according to my own judgment and my own discretion, the duties the people have entrusted to me as their Governor. I would not be faithful to my oath of office, should I surrender to any Federal or other Courts the rights to exercise those discretionary powers the law has placed in me, to maintain law and order, to prevent a breach of the peace, violence or bloodshed, and my discretion must remain free. I shall ever and eternally stand for the exercise of my own discretion in my own right, and shall repudiate the right of anyone to take that discretion away from me and exercise it in my behalf. The Constitutions of the United States and the State of Mississippi provide for the separation of the Judicial, Executive and Legislative functions. The people have never given any right to any one of these departments to act for the other.

If any act that I have done as Governor or any act I shall do as Governor in the future causes any person to believe that I have violated his right, the Courts are open to challenge me again in a proper court proceeding. Mississippi has not yet had her day in Court.

My position is based upon the Constitution of the United States and the Constitution and Laws of the State of Mississippi. My every decision in this matter has been formed after careful and deliberate consideration of what I believe to be the law. I have not changed my position in the slightest degree. I shall never apologize for anything I have said or done in this regard because I have acted in good faith in discharging the duties entrusted to me. My conscience is clear. I am moved only by deep and abiding affection for the welfare of all the people of Mississippi. I shall ever keep the faith that the people of Mississippi have entrusted to me as their Governor.

President of the United States issued a proclamation in the following language:

> Whereas the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit; and
>
> Whereas such unlawful assemblies, combinations and conspiracies oppose and obstruct the execution of the laws of the United States, impede the course of justice under those laws and make it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; and
>
> Whereas I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assurances that the orders of the courts of the United States will be obeyed and that law and order will be maintained;
>
> Now, therefore, I, John F. Kennedy, President of the United States, under and by virtue of the authority vested in me by the Constitution and

laws of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstructions of justice to cease and desist therefrom and to disperse and retire peacefully forthwith.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this 30th day of September in the year of our Lord Nineteen Hundred and Sixty-Two, and of the independence of the United States of America the One Hundred and Eighty-Seventh.

/s/ JOHN F. KENNEDY

The President also issued an executive order as a result of which a large force of United States Marshals and a part of the Army and Air Forces of the United States were employed for the enforcement of our orders.

16. At that hearing the Court also considered the motion to dissolve the temporary restraining order and the motions of the United States to enter a preliminary injunction. The Court again heard and received all of the evidence that had previously been offered at the hearing of September 28 and 29.

17. On October 19, 1962, a majority of this Court en banc (Judges Hutcheson and Cameron not sitting and

Judges Gewin and Bell stating that they thought the matter should be remanded to the District Court for further proceedings) entered its preliminary injunction. The seven members of the Court unanimously concluded:

> The posture of this case at the time this motion for temporary injunction and the accompanying motion for temporary restraining order were filed, is that this Court had issued its injunction, above referred to, prohibiting the officials of the University and the Trustees of the Institutions of Higher Learning of the State of Mississippi from interfering with the admission of James H. Meredith and his continuance as a student in the University of Mississippi, and also prohibiting certain of the defendants now before the Court from further prosecuting criminal proceedings against the said Meredith; whereupon, it was alleged in this petition, the State of Mississippi, through its official state policy, pursuant to actions of its Legislature, and through the actions of its Governor by proclamation, and all of the other respondents, were then engaged in actively frustrating the execution of this Court's injunction against the officials of the University. This proceeding, therefore, is purely ancillary to the original lawsuit, and this Court has ample power to proceed against any party, including the State of Mississippi, which is shown to be engaged in a wilful, intentional effort to frustrate this Court's injunction.
>
> The motion to dissolve the restraining order and

the motion to dismiss the contempt proceedings by the State of Mississippi are, therefore, DENIED.

The ruling just stated equally disposes of the contention made by the respondents that this Court is now powerless to issue the temporary injunction. We, therefore, hold that the Court has the power to issue the injunction against the persons not previously named as defendants in the main suit to prevent their active interference with this Court's injunction.

The evidence adduced before this Court, neither attacked by respondents nor contended by them to be legally insufficient to warrant the granting of the relief sought, establishes the following facts:

The State of Mississippi, Ross R. Barnett, Governor of Mississippi, Joe T. Patterson, Attorney General of Mississippi, T. B. Birdsong, Commissioner of Public Safety of Mississippi, Paul G. Alexander, District Attorney of Hinds County, William R. Lamb, District Attorney of Lafayette County, J. Robert Gilfoy, Sheriff of Hinds County, J. W. Ford, Sheriff of Lafayette County, William D. Rayfield, Chief of Police of the City of Jackson, James D. Jones, Chief of Police of the City of Oxford, Walton Smith, Constable of the City of Oxford, threaten to implement and enforce, unless restrained by order of this Court, the provisions of a Resolution of Interposition adopted by the Mississippi Legislature, the provisions of Section 4065.3 of the Mississippi Code, and a Procla-

mation of Ross R. Barnett invoking the doctrine of interposition with respect to the enforcement of the orders of this Court in this case; that Paul G. Alexander has instituted two criminal prosecutions against James Howard Meredith on account of the efforts of James Howard Meredith to enter the University of Mississippi pursuant to the orders of this Court; that on September 20, 1962, James Howard Meredith, while seeking to enroll at the University of Mississippi in Oxford, Mississippi, pursuant to the orders of this Court, was served with a writ of injunction issued by the Chancery Court of Lafayette County, Mississippi, at the instance of Ross R. Barnett, enjoining James Howard Meredith from applying to or attending the University of Mississippi; that on September 20, 1962 the State of Mississippi enacted Senate Bill 1501, the effect of which is to punish James Howard Meredith should he seek enrollment in the University of Mississippi; that the effect of the conduct of the defendants herein named to implementing the policy of the State of Mississippi, as proclaimed by Ross R. Barnett will necessarily be to prevent the carrying out of the orders of this Court and of the District Court for the Southern District of Mississippi; and that the acts and conduct of the defendants named in the petition will cause immediate and irreparable injury to the appellant Meredith and to the United States consisting of the impairment of the integrity of its judicial processes, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the

United States unless prevented by an order of the Court.

18. Thereafter this Court (Judges Hutcheson and Cameron not sitting) entered its order of November 15, 1962, which ordered that "The Attorney General of the United States, and such Attorneys in the Department of Justice as he may designate, be and they hereby are appointed by the Court to institute and to prosecute criminal contempt proceedings against the said Ross R. Barnett and Paul B. Johnson, Jr., pursuant to Rule 42b of the Federal Rules of Criminal Procedure and the order of this Court of September 18, 1962." The order recited that it appeared "from the pleadings filed and the oral testimony and documentary evidence already adduced in the proceedings on the petitions for temporary restraining order and for preliminary injunction and the civil contempt proceedings heretofore instituted against Ross R. Barnett and Paul B. Johnson, Jr. that proceedings should be instituted against the said Ross R. Barnett and Paul B. Johnson, Jr., to determine whether they are, or either of them is, guilty of criminal contempt of the orders of this court;"

19. Thereafter the United States through the Attorney General filed on December 21, 1962, its application for an order requiring Ross R. Barnett and Paul B. Johnson, Jr. to show cause why they should not be held in criminal contempt. This application alleged, in four numbered counts, certain conduct of Barnett and Johnson which were thereafter made the basis of this Court's order to show cause hereafter set out in Paragraph 21.

20. On January 3, 1963, the Court entered an order con-

stituting the Court en banc for the consideration of all matters relating to criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr. (Judge Hutcheson "is excused from participating in the hearings and decisions of this Court by reason of conditions of his health").

21. Thereafter this Court en banc (Judges Cameron and Gewin dissenting) entered its order to show cause on January 4, 1963. The show cause order contained the following charges and order:

> Probable cause has been made to appear from the application of the Attorney General filed December 21, 1962, in the name of and on behalf of the United States that on September 25, 1962, Ross R. Barnett, having been served with and having actual notice of this Court's temporary restraining order of September 25, 1962, wilfully prevented James H. Meredith from entering the offices of the Board of Trustees of the University of Mississippi in Jackson, Mississippi, and thereby deliberately prevented James H. Meredith from enrolling as a student in the University pursuant to this Court's order of July 28, 1962; that on September 26, 1962, Paul B. Johnson, Jr., acting under the authorization and direction of Ross R. Barnett, and as his agent and as an agent and officer of the State of Mississippi, and while having actual notice of the temporary restraining order of September 25, 1962, wilfully prevented James H. Meredith from entering the campus of the University of Mississippi in Oxford, Mississippi, and thereby deliberately prevented James H. Meredith

from enrolling as a student in the University, pursuant to the orders of this Court; that on September 27, 1962, Ross R. Barnett and Paul B. Johnson, Jr. wilfully failed to take such measures as were necessary to maintain law and order upon the campus of the University of Mississippi and did, instead, direct and encourage certain members of the Mississippi Highway Safety Patrol, Sheriffs and deputy Sheriffs and other officials of the State of Mississippi to obstruct and prevent the entry of James H. Meredith upon the campus of the University that day; that on September 30, 1962, Ross R. Barnett, knowing of the planned entry of James H. Meredith upon the campus of the University of Mississippi, knowing that disorders and disturbances had attended and would attend such entry, and knowing that any failure of the Mississippi Highway Patrol to take all possible measures for the maintenance of peace and order upon the campus could and would result in interferences with and obstructions to the carrying out of the Court's order of July 28, 1962, wilfully failed to exercise his responsibility, authority, and influence as Governor to maintain law and order upon the campus of the University of Mississippi; and that all of said acts, omissions and conduct of Ross R. Barnett and Paul B. Johnson, Jr., were for the purpose of preventing compliance with this Court's order of July 28, 1962, and of the similar order of the United States District Court for the Southern District of Mississippi, entered on September 13, 1962, and were in wilful disobedience and

defiance of the temporary restraining order of this Court entered on September 25, 1962.

IT IS ORDERED that Ross R. Barnett and Paul B. Johnson, Jr., appear before this Court in the courtroom of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, on February 8, 1963, at 9:30 o'clock a.m., to show cause, if any they have, and why they should not be held in criminal contempt, and should either of them at said time and place show such cause, either by pleading not guilty to the charges contained in the application of the United States, or by other means, he shall thereafter appear before this Court for hearing upon said charges at a time and place to be fixed by the Court.

The Chief Judge of this Court then directed the Clerk, for convenience in handling all matters relating to the criminal contempt proceedings to assign a new number, No. 20,240, and a new caption, "United States v. Ross R. Barnett and Paul B. Johnson, Jr.", to the case.

Pursuant to notice from the Court, respondents filed nine motions and the State of Mississippi filed one motion to be considered at the hearing. These motions may be briefly described as follows:

1. Motion and plea of the State of Mississippi to dismiss the proceedings as being in violation of the Tenth and Eleventh Amendments to the Constitution.

2. Motions of Barnett and Johnson to dismiss all proceedings in original Action No. 20,240 for lack of process.

3. First alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 and all contempt proceedings in cause No. 19,475 based on improper and insufficient application.

4. Second alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 for lack o .. ue or jurisdiction.

5. Third alternative motions of Barnett and Johnson to dismiss all pending proceedings in Criminal Contempt for lack of Grand Jury presentment or indictment.

6. Demands of Barnett and Johnson for trial by jury.

7. Fourth alternative motions of Barnett and Johnson to dismiss all proceedings in original action No. 20,240 for lack of jurisdiction to summons a constitutional jury.

8. Motions of Barnett and Johnson for severance.

9. Motion of Johnson to strike the third charge contained in the order to show cause of date January 4, 1963.

10. Motion of Barnett to strike the third and fourth charges contained in the order to show cause of date January 4, 1963.

After oral argument a majority of the members of the Court, as indicated on the order of the Court filed this date, sustained the motion of the United States to strike the motion and plea numbered 1, overruled or denied motions numbered 2, 3, 4, 5 and 7, decided to certify the question raised by the motion numbered 6, and the motions numbered 8, 9 and 10 are not now passed on.

Consideration has been given to attaching as Exhibits certified photostatic copies of each and all of the pleadings, motions and orders referred to in the foregoing statement. The Court is of the view that this would be unnecessarily cumbersome since the summary or paraphrased statement of any such pleadings, motions and orders is not intended to modify them in any way, and the Supreme Court will, wherever appropriate, consider the exact terms of the pleadings, motions and orders which are incorporated by reference and which have been referred to in the opinions filed herein by the several Judges.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.
Defendants.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

Before TUTTLE, Chief Judge, and RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN, and BELL, Circuit Judges.

TUTTLE, Chief Judge, and RIVES, BROWN and WISDOM, Circuit Judges: The United States entered the case of *James H. Meredith, et al. v. Charles Dickson Fair, et al.*, No. 19475, pursuant to this Court's order of September 18, 1962, "that the United States be designated and authorized to appear and participate as amicus curiae in all pro-

ceedings in this action before this Court and by reason of the mandates and orders of this Court of July 27, 28, 1962, and subsequently thereto, also before the District Court for the Southern District of Mississippi, to accord each Court the benefits of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs *and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court,* as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States." (Emphasis supplied.)

In its order of November 15, 1962, this Court ordered "that the Attorney General of the United States, and such attorneys in the Department of Justice as he may designate, be and they are hereby appointed by the Court to institute and to prosecute criminal contempt proceedings against the said Ross R. Barnett and Paul B. Johnson, Jr., pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of this Court of September 18, 1962,"

On December 21, 1962, the United States applied to this Court "for an order requiring Ross R. Barnett and Paul B. Johnson, Jr., to show cause, if any they have, why they should not be held in criminal contempt of this Court for wilfully disobeying the temporary restraining order entered on September 25, 1962, in *United States* v. *State of Mississippi, et al.,* No. 19,475."

On January 3, 1963, this Court ordered that Ross R. Barnett and Paul B. Johnson, Jr. appear on February 8,

1963 and "show cause, if any they have, why they should not be held in criminal contempt either by pleading not guilty to the charges contained in the application of the United States, or by other means, and that they thereafter appear before this Court for hearing upon said charges at a time and place to be fixed by this Court."

On February 1, 1963, a number of motions and demands were filed in this case, captioned substantially as follows:

A. Motion and Plea of the State of Mississippi.

1. Motions of Barnett and Johnson to Dismiss All Proceedings in Original Action No. 20,240 for Lack of Process.

2. First Alternative Motions of Barnett and Johnson to Dismiss Original Proceedings in cause No. 20,240 and all Contempt Proceedings in cause No. 19,475 based on Improper and Insufficient Application.

3. Second Alternative Motions of Barnett and Johnson to Dismiss Original Proceedings in cause No. 20,240 for Lack of Venue or Jurisdiction.

4. Third Alternative Motions of Barnett and Johnson to Dismiss all Pending Proceedings in Criminal Contempt for Lack of Grand Jury Presentment or Indictment.

5. Fourth Alternative Motions of Barnett and

Johnson to dismiss all Proceedings in Original action No. 20,240 for Lack of Jurisdiction to summons a Constitutional Jury.

6. Demands of Barnett and Johnson for Trial by Jury.

R1. Motions of Barnett and Johnson for Severance.

R2. Motion of Johnson to Strike the Third Charge contained in the Order to Show Cause of date January 4, 1963.

R3. Motion of Barnett to Strike the Third and Fourth Charges contained in the Order to Show Cause of date January 4, 1963.

Briefs in support of and in opposition to the said motions and demands were filed, and on February 8, 1963 this Court en banc heard daylong oral arguments. At that time this Court granted the motion of the United States to strike motion A, that is the "Motion and Plea of the State of Mississippi," but considered Mississippi's brief filed in support of that motion as a brief filed by an amicus curiae, and invited counsel for the State as amicus curiae to make oral argument before the Court. Thereafter, this Court denied the motions heretofore listed as numbers 1, 2, 3, 4 and 5, and reserved its rulings on the motions listed as numbers R1, R2 and R3.

We four Judges are in favor of denying the demands

listed as number 6; that is, the demands of the defendants for trial by jury. [Since this Court was unable to dispose of those demands by majority vote, we join in certifying to the Supreme Court of the United States the question thus presented. We state briefly the reasons for our view that the demands of the defendants for trial by jury should be denied.]

Logically and legally connected with the said demands, on the disposition of which our brothers do not agree with us, are the motions, listed as number 4, to dismiss the proceedings in criminal contempt for lack of grand jury presentment or indictment which all of our brothers with the exception of Judge Cameron have joined us in denying. In all of the books and records, so far as counsel have been able to advise us or as we have discovered, there is not a single precedent of any criminal contempt of court proceeding *ever* having been prosecuted by grand jury presentment or indictment. In *Green v. United States*, 1958, 356 U.S. 165, 187, the Supreme Court held that " . . . it is clear that criminal contempts, although subject, as we have held, to sentences of imprisonment exceeding one year, need not be prosecuted by indictment under the Fifth Amendment."[1]

It is elementary that the court against which a contempt is committed has exclusive jurisdiction to punish for such

[1]See also, Goldfine v. United States, 1 Cir. 1959, 268 F. 2d 941, cert. denied, 363 U. S. 842, 80 S. Ct. 1608, 4 L. Ed. 2d 1727; United States v. DeSimone, 2 Cir. 1959, 267 F. 2d 741, cert. denied, 361 U. S. 827, 41 L. Ed. 2d 70, 80 S. Ct. 74, cert. granted to vacate as moot, 361 U. S. 125, 4 L. Ed. 2d 167, 80 S. Ct. 253.

contempt. *In re Debs*, 1895, 158 U.S. 565, 595;[2] *Ex parte Bradley*, 1868, 74 U.S. 364, 377. To the principle that every court possesses the power to punish for criminal contempt committed against it, this Court of Appeals is no exception. Such power is "inherent." See *In re Debs, supra*, 158, U.S. at 596. Further, such power is expressly conferred by Title 18, United States Code, Section 401, which provides in part pertinent to the present case:

> "A court of the United States[3] shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —
>
> . . . . . .
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

The defendants assert that this Court "is without statutory power or authority to summons a constitutional jury." While lack of a statutory procedure to obtain a jury would not satisfy a demand for a jury if one existed as a matter

[2] It is interesting to note that the Supreme Court quotes with approval from an opinion of the Supreme Court of Mississippi as follows:

"In *Watson v. Williams*, 36 Mississippi, 331, 341, it was said: 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.'"

[3] There can be no doubt that "court of the United States" includes this Court of Appeals. See 28 U.S.C.A. § 451; 10 Words and Phrases, Perm. ed., pp. 273-275, and pocket supplement.

of constitutional right, the complete absence of any such mechanism is strong evidence that Congress has not impliedly recognized any such right as a statutory one.

The defendants insist, however, that they do have a constitutional right of trial by jury under one or more of the following provisions of the Constitution:

ARTICLE III, §2, Par. 3.

> "The trial of all crimes . . . shall be by Jury; and such trial shall be held in the State where the said crimes shall have been committed . . . . "

AMENDMENT V.

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . "

AMENDMENT VI.

> "In all criminal Prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation . . . "

AMENDMENT VII.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In support of their insistence on a constitutional right of trial by jury, the defendants have advanced not a single argument which has not already been considered and ruled adversely to their views by the Supreme Court of the United States. As lately as 1958, in *Green v. United States, supra,* the Supreme Court held that criminal contempts are not subject to jury trial as a matter of constitutional right. We four judges consider that decision as binding upon us. Further, with deference to the dissenting Justices, it is our opinion that the views of the majority of the Supreme Court as there expressed are soundly based not only on precedent, as must be conceded, but also on reason and logic. It would be threshing old straw for us to say more on the question of constitutional right.

There being no constitutional right to trial by jury, we look next to the statutes. As has already been commented, the defendants contend, and we agree, that this Court "is without statutory power or authority to summons a constitutional jury." Further, as has been mentioned, this Court possesses the power to punish for criminal contempt confirmed by Title 18, United States Code, Section 401. It would then be strange indeed to find that some other statute

grants to the defendants a right of trial by jury, and we find no such statute.

It would appear that, prior to the occasions here involved, there had never been such willful disobedience or resistance to an order, judgment or decree of a Court of Appeals of the United States as to make necessary the institution of original proceedings in criminal contempt. We do find such a proceeding for contempt of the Supreme Court of the United States, viz: *United States v. Shipp*, 1906, 203 U.S. 563; 1909, 214 U.S. 386; 1909, 215 U.S. 580. That proceeding was disposed of by the Supreme Court without the intervention of a jury. We find in the opinions of the Court no discussion of any right of trial by jury, but it clearly appears from the following part of the "Argument for the United States," as reported in 203 U.S. 564, that the subject was not overlooked:

> "There is no right to a trial by jury in contempt cases. *Eilenbecker v. Plymouth County*, 134 U.S. 31; *Ex parte Terry*, 128 U.S. 289; *Ex parte Savin*, 131 U.S. 267; *Ex parte Cuddy*, 131 U.S. 280; *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 489; *In re Debs*, 158 U.S. 564."

In directing the Attorney General of the United States to institute and prosecute criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr. "pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure," there was no intimation that the proceedings be instituted or prosecuted in a district court. Those rules apply to all criminal proceedings in the United States Courts of Appeals. Rule 54(a)(1), Federal Rules of Crimi-

nal Procedure. Further, "Rule 42 of the Federal Rules of Criminal Procedure is no innovation. It simply makes 'more explicit' the long-settled usages of law governing the procedure to be followed in contempt proceedings." *Brown v. United States*, 1959, 359 U.S. 41, 51. See also, *Offutt v. United States*, 1954, 348 U.S. 11, 13, 14; *Sacher v. United States*, 1952, 343 U.S. 1, 7.

Rule 42(b) provides that, "The defendant is entitled to a trial by jury in any case in which an act of Congress so provides." That provision, and the acts of Congress to which it refers, constitute clear recognitions of the absence of any constitutional right of the defendants to trial by jury.

The only statutes upon which the defendants rely are Sections 402 and 3691 of Title 18, United States Code, which read as follows:

> "Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> "Such fine shall be paid to the United States or

to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." 18 U.S.C.A. § 402.

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

"This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." 18 U.S.C.A. §3691.

By explicit language, Section 3691 is limited to contempts which "consist in willful disobedience of any lawful writ, process, order, rule, decree or command of *any district court* of the United States."[4] (Emphasis supplied.) It has no application to a proceeding for contempt against a Court of Appeals. Section 402 refers to "any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of *any district court of the United States or any court of the District of Columbia* . . . . " (Emphasis supplied.)

The defendants argue that "any court of the District of Columbia" as used in Section 402 includes the United States Court of Appeals for the judicial circuit composed of the District of Columbia. See Sections 41 and 43 of Title 28, United States Code. As appears from the "Historical and Revision Notes" appended to 18 U.S.C.A. §402, that section was derived from the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, which had conferred extensive jurisdiction under the antitrust laws on the district courts

[4]The term "district court of the United States" means one of the courts constituted by Chapter 5 of Title 28, United States Code. — See 28 U.S.C.A. § 451; 13 Words & Phrases, Perm. ed. p. 41

of the United States and the courts of the District of Columbia. It seems clear to us that "any court of the District of Columbia" as used in Section 402 does not include the United States Court of Appeals for the District of Columbia Circuit.

Let us, however, *arguendo* assume that point to be in accord with the contention of the defendants. By some sort of "tail wags dog" argument the defendants would then extend "any court of the District of Columbia" to include all of the other ten United States Courts of Appeals. That remarkable feat is accomplished simply by waving the wand of Article IV, Section 2, Clause 1 of the Constitution of the United States, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The short answer to that argument is that, "Section 2 of Article IV is inapplicable to the District of Columbia. It is a limitation upon the powers of the states and in no way affects the powers of Congress over the territories and the District of Columbia." *Duehay v. Acacia Mut. Life Ins. Co.*, D.C. Cir., 1939, 105 F. 2d 768, 775. See also, *Martinsen v. Mullaney*, D.C. Alaska, 1949, 85 F. Supp. 76, 79.

It seems to us beyond controversy that there is no act of Congress granting to a defendant charged with criminal contempt for disobedience or resistance to a "lawful writ, process, order, rule, decree, or command" (18 U.S.C.A. §401 (3)) of a United States Court of Appeals a right of trial by jury. So clearly does that appear that we make extremely brief our discussion of another sound reason why Sections 402 and 3691 do not apply to the contempts charged against the defendants; viz: that such contempts are charged

to have been committed in disobedience of a lawful writ, etc. "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." Sections 402 and 3691 of Title 18, United States Code.

This Court's order of September 18, 1962, from which we have quoted at the beginning of this opinion, constituted the United States as something more than a mere amicus curiae. Pursuant to that order, the United States was " . . . acting under the authority and direction of the court to take such action as was necessary to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice." *Faubus v. United States*, 8 Cir., 1958, 254 U.S. 797, 805, cert. denied, 358 U.S. 829.[8]

Upon a verified petition filed by the United States, this Court on September 25, 1962, issued its order temporarily restraining, among others, Ross R. Barnett "and all persons in active concert or participation" with him from:

> "1. Arresting, attempting to arrest, prosecuting or instituting any prosecution against James Howard Meredith under any statute, ordinance, rule or regulation whatever, on account of his

[8]See also, Bush v. Orleans Parish School Bd., E.D. La. 1960, 188 F. Supp. 916, aff'd, 365 U. S. 569, 5 L. Ed. 2d 806, 81 S. Ct. 754 (1961); Bush v. Orleans Parish School Bd., E.D. La. 1960, 190 F. Supp. 861, aff'd sub nom; New Orleans v. Bush, 1961, 366 U. S. 212, 6 L. Ed. 2d 239, 81 S. Ct. 1091; Bush v. Orleans Parish School Board, E.D. La. 1961, 191 F. Supp. 871, aff'd, 368 U. S. 11 (1961), 7 L. Ed. 2d 75, 82 S. Ct. 119; Hall v. St. Helena Parish School Board, E.D. La. 1961, 197 F. Supp. 649, aff'd 368 U. S. 515, 7 L. Ed. 2d 521, 82 S. Ct. 529; Allen v. State Bd. of Educ., No. 2106 (E.D. La.), m/s; Angel v. State Bd. of Educ., No. 1656 (E.D. La.), m/s; Davis v. East Baton Rouge Parish School Bd., No. 1662 (E.D. La.), m/s.

attending, or seeking to attend, the University of Mississippi;

"2. Instituting or proceeding further in any civil action against James Howard Meredith or any other persons on account of James Howard Meredith's enrolling or seeking to enroll, or attending the University of Mississippi;

"3. Injuring, harassing, threatening or intimidating James Howard Meredith in any other way or by any other means on account of his attending or seeking to attend the University of Mississippi;

"4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

"5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty."

Ross R. Barnett and Paul B. Johnson, Jr. now stand under this Court's order "to show cause, if any they have, why they should not be held in criminal contempt," and are required to plead "to the charges contained in the application of the United States." Each count of those charges is based upon "criminal contempt of this Court for wilfully disobeying the temporary restraining order entered on September 25, 1962, in *United States v. State of Mississippi, et al.*, No. 19475."

The contempts are charged to have been committed in disobedience of a temporary restraining order entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United States. Each of the two Sections 402 and 3691 of Title 18, United States Code provides that it shall not relate or be applicable to such contempts.

To summarize: 1) the Supreme Court has definitely held that criminal contempts are not subject to jury trial as a matter of constitutional right; 2) there is no Act of Congress entitling the defendants to a trial by jury for contempt against a Court of Appeals; 3) the defendants are not entitled to a trial by jury because they are charged with willful disobedience of a restraining order entered in a suit or action brought or prosecuted in the name of, or on behalf of the United States.

In our opinion this Court has no duty or power to accord the defendants a trial by jury, but is under the clear duty itself to proceed without unnecessary delay to try the defendants for the criminal contempts charged.

COMMENTS AS TO FOUR SEPARATE OPINIONS

In order to facilitate preparation of the various opinions, the foregoing part of this opinion was first circulated. Thereafter each of the other four Judges circulated his opinion. After consideration of their four separate opinions, we think the following comments appropriate.

Two main contentions seem to run throughout the several opinions though stated in various ways. The first is, as Judge Bell succinctly phrases it, "in short, we must abide the statutes applicable to the district court when we act as a district court."

This is apparently based on the fact that in the orders of July 27-28 and again in the restraining order of September 25, this Court issued its own injunction. From this it is presumably argued that since district courts ordinarily issue injunctions, our essential nature changes from an appellate to a trial court when we issue an order with traditional *nisi prius* characteristics. In other words, the character of a court is fixed, not by the organic statute establishing it, but by the nature of the order issued at any given time.

This ignores at least two things. First, and paramount, is the fact that Congress has specifically clothed this Court in the disposition of cases before it with the express power to issue whatever orders are appropriate, 28 U.S.C.A. §2106.[6] Second, this court, as have most others, has not

[6] "§ 2106. Determination. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or

felt itself bound as a matter of power to the mechanism of a direction to the district court. Ordinarily this will be done. But frequently in run-of-the-mill cases, we have reversed and *rendered* decisions for one of the parties. If it may be done for a money judgment, it may likewise be done as to equitable relief. The statute and the practice reflect the flexible standard of that which is *appropriate*. What is *needed* is assuredly encompassed in what is appropriate. And it is now way too late to urge that injunctive orders of this Court were not needed to effectuate the holding in this Court's opinion of June 25 in the *Meredith* case,[7] 305 F. 2d 343.

The second main theme is closely akin to the first. The argument is made that the Government chose this Court rather than the District Court as the forum in which to assert its interest. From that it is argued that while §§402 and 3691 each speak in terms of "any district court of the United States," we must read this as though Congress expressly specified a Court of Appeals as well. This is so because otherwise the Government, by artful, purposeful

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order, or require such further proceedings to be had as may be just under the circumstances."

To this must be added the all writs statute, 28 U.S.C.A. § 1651.

7 With the successive stays of Judge Cameron (vacated by our several orders), the District Court either was, or thought itself, unable to take action. Unless this Court's decision of June 25 was to be frustrated, affirmative action was needed then and there. It had to come from and *through* this Court, and this Court alone. Hence the injunctive orders of July 27-28 were imperatively required.

Similarly this Court en banc unanimously on October 19, 1962, entered its preliminary injunction (Judges Bell and Gewin dissenting on one limited phase). In most unmistakable terms, it reaffirmed that the temporary injunctive orders of September 25 and 26 against the Governor and Lieutenant Governor, respectively, were each appropriate and essential.

choice, could defeat a statutory right accorded contempt defendants had it gone into the District Court instead. Of course at the bottom of this argument is the assertion made at many times and in many ways that there was no need for this Court to have issued its injunctive orders of July 27-28 in the continuing terms employed, and that there was no need for it to enter its temporary restraining orders of September 25-26. A branch of that contention apparently is that once the District Court entered its injunction on September 13, our interest came to an end.

But our order was a continuing one until, in effect, Meredith should be admitted to and continued as a student on the same basis as any other student. The facts of record in this Court show without contradiction that until Sunday, September 30, 1962, Meredith was not admitted to the University and, indeed, he was prevented from admission by direct personal interposition of the Governor and Lieutenant Governor. During all of the events which occurred between September 13 and September 30, it was this Court's orders which were being wilfully disobeyed. While these actions amounted to disobedience of the District Court's injunction as well, this Court was hardly so powerless that to secure obedience to its own orders it would have to refer the matter to the District Court. At the time of the issuance of the temporary restraining orders of September 25-26, Meredith was not yet in the University. By the terms of this Court's order, the injunction issued by it continued at least until Meredith was admitted. It was this Court, then, whose orders were being frustrated.

While the Government took the initiative in seeking leave to enter the case as so-called amicus curiae with the

specified powers, this Court must assume the full responsibility for the Government's presence thereafter. For only by the entry of the order of September 18 could the United States have participated. This was in effect a recognition that the sovereign's presence was needed by this Court to effectuate its decrees and to maintain and uphold the rule of law. All of this became doubly clear when in the course of hearings on the various civil contempt matters, it became evident that injunctive orders ancillary to the main case had to be entered against the Governor and Lieutenant Governor. And what was then understood to be a necessity calling for temporary relief was reaffirmed when the Court en banc on October 19, 1962, reaffirmed that action by the issuance of its preliminary injunction which is still in force and effect.

It was this Court which made its ruling of June 25. It was this Court which made its orders of July 27-28. It was this Court whose orders were being disobeyed. It was this Court which needed the assistance of the sovereign and called upon it to take appropriate steps for the execution of the decrees of this Court. The rights of these Defendants are not then to be measured by what might have been claimed had these asserted acts of defiance taken place as to the District Court alone.

Moreover, this Court had ancillary jurisdiction to effectuate its own decrees. To that end it was certainly appropriate that the Court in effect call on the sovereign's law officer to initiate and prosecute the necessary proceedings. The Court's power to conduct the proceedings ancillary to the main cause to protect and effectuate its decrees is well settled. *Toledo Scale Co. v. Computing Scale Co.*, 7

Cir. 1922, 281 Fed. 488, aff'd 261 U.S. 399 (1923); *Sawyer v. Dollar*, D.C. Cir. 1951, 190 F. 2d 623, vacated as moot, 344 U.S. 806 (1952); *Merrimack River Savings Bank v. Clay Center*, 1911, 219 U.S. 527. And, of course, this Court continued to have jurisdiction even after its mandate of July 28. By the terms of its affirmative injunction, it reserved jurisdiction, and even without express reservation the Court retained power to conduct further proceedings to protect its decrees after its mandate had issued. *United States v. United States District Court*, 1948, 334 U.S. 258; *National Brake Co. v. Christensen*, 1921, 254 U.S. 425; *Root Refining Co. v. Universal Oil Products Co.*, 3 Cir. 1948, 169 F. 2d 514, cert. denied, 332 U.S. 813; *Sawyer v. Dollar, supra.*

Since the Court had this power the argument expressed or implied, particularly in the opinions of Judges Cameron and Gewin, as to the amicus status of the Government does not detract from the validity of the Court's orders. The argument seems to be that the Government cannot be an amicus because it has taken, and continues to take, a partisan position. But a Court empowered to take ancillary action to effectuate its decree is hardly to be left to the assistance of one having the neutral position of a traditional amicus. Within its sound discretion it is for the Court to determine whether the presence of the United States having the status of a quasi-party is needed. Here, the Court on September 18 recognized that the United States was needed not only to "accord each Court the benefit of its views" but more important "to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due

administration of justice and the integrity of the judicial processes of the United States." This was not, as some of the opinions suggested (see, e.g., Judge Bell's opinion, Part V), the Government obtaining through a permissive court order that which it is asserted Congress has declined to allow. This was not the Government instituting a suit or intervening on behalf of private litigants to vindicate the civil rights of private suitors. It was the sovereign intervening in the sovereign's court to uphold and maintain the sovereign's rule of law. Congress never meant to withhold that power. If the effect of that is to make the United States a party then at least one problem arises, and one consequence flows from it.

The problem is whether the Government could become a party in this manner. The Federal Rules of Civil Procedure are not generally applicable to the Court of Appeals. F.R. Civ. P. 1. Hence, failure to follow F.R. Civ. P. 24 and 6(d) does not imperil either the order of September 18 or the temporary restraining orders of September 25. It is then only a question of assuring the parties thereby affected — here, Governor Barnett and Lieutenant Governor Johnson —of procedural due process by according them a fair opportunity to challenge the right of the Government to come into the case and the power or propriety of the Court's allowing the Government to do so. These defendants have repeatedly challenged these actions, and the Court — as it did en banc as recently as October 19 — has rejected their contentions.*

Once it is established or assumed that the Government

*Allowance of the intervention of the Government was, so we are informed, one of the errors urged in the petition for certiorari in State of Mississippi v. James Howard Meredith, USA No. 661, Oct. Term 1962, cert. denied U. S.

is a "party" and procedural fairness has been accorded, as was the case here, the consequence is to add further weight to the proposition that a jury trial is not available since the alleged contempt is for violation of an order "entered in an action brought or prosecuted in the name of, or on behalf of, the United States."

Perhaps some brief comment should also be made as to the suggestion made in Judge Cameron's opinion that the panel of Judges Brown, Wisdom and DeVane (District Judge sitting by designation) was not a duly constituted court. By the practice traditionally followed in the Fifth Circuit, the panel which has heard the case and written the opinion has the responsibility for handling all matters growing out of such disposition. The so-called summer panels[9] are designated as a matter of administrative convenience to handle motions, emergency matters, and the like in proceedings not theretofore submitted to a panel. Hence, all of the actions taken by the panel of Judges Brown, Wisdom and DeVane in July and August were properly for that panel and none other. Indeed, it was for this reason among others that such panel vacated the several stays entered by Judge Cameron.

Judge Cameron's similar suggestions made as to the temporary restraining orders of September 25 (Chief Judge Tuttle, Judges Rives and Wisdom), the show cause order

[9]This Circuit has had summer panels for the last two summers only. They are empanelled in accordance with the direction of the Judicial Council of the Circuit as evidenced by the minutes of the meeting of the Council held in Atlanta, Georgia, on October 17, 1960, as follows:

"IV. The Chief Judge submitted to the Council his suggestion that, during the summer recess of this Court, stand-by panels be designated for each month of the summer — July, August and September. After a discussion, that suggestion was adopted."

directed to Governor Barnett at 8:20 P.M., September 25 (Judges Rives, Wisdom and Gewin), the show cause order of September 26 directed to Lieutenant Governor Johnson (Judges Rives, Brown and Wisdom), and the other orders of the same dates are likewise answered. Further, while the Court was still assembled en banc on the evening of September 24, it was informed that the United States had an application for temporary restraining orders which it desired to present. As it was then late in the evening and several of the Judges were engaged in drafting orders to effectuate rulings made that day, the full Court (Judge Cameron not then sitting) agreed that issuance and entry of these ancillary orders could be done by panels of three judges. In addition, the Court en banc thereafter unanimously reaffirmed each of these orders as its own; thus, for example the order of September 28 adjudging Governor Barnett in civil contempt recited that, "This Court * * * on September 25 issued orders requiring Ross R. Barnett to appear * * * to show cause," and in paragraph two expressly found as a fact that "on September 25, 1962 this Court entered its temporary restraining orders." As to Lieutenant Governor Johnson the Court, that same day, September 28, agreed that the contempt hearing fixed for September 29 should be held and appropriate orders entered by a panel (Judges Rives, Brown and Wisdom). And by the order of October 19 granting a preliminary injunction following the en banc hearing thereon held October 12, the Court again reaffirmed all of these orders.

We remain of the opinion that this Court has jurisdiction and that the defendants are not entitled to a trial by jury.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

GOVERNOR ROSS R. BARNETT and
LIEUTENANT GOVERNOR PAUL B. JOHNSON, JR.
Defendants.

Before TUTTLE, Chief Judge, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

CAMERON, Circuit Judge: Before us stand the highest two executive officers of a Sovereign State of this Union, charged, by direction of this Court, with the criminal offense of contumacious violation of its injunctive order. Never before has such a charge been brought by or in a Court of Appeals since its establishment by Congress in 1891, against either a state officer or a private citizen. It behooves us, I am confident we all agree, to be very sure

that we have jurisdiction to issue and enforce such a drastic and unprecedented order involving the most delicate relationships between the State and Federal Governments, and that our procedures are in strict conformity with the Constitution and laws which govern our actions.

In the circumstances here present, I think that a heavy burden rests upon those who oppose defendants' demand for a jury trial to demonstrate, by the clearest possible showing, that their position is sound in all requisite respects.

I do not think it is sound. The opinions of Judges Jones, Gewin and Bell are to me unanswerable. I desire to set down a few reasons for my conviction that the position of the opposition is unsound, hoping to avoid too much repetition, and that what I write may supplement what my Brothers have so well said.

I.

I think it is important to place our court order which the defendants are charged with having violated in its correct context and to be sure that it is considered in proper perspective. Specifically, the defendants are charged by this Court with having wilfully violated a restraining order issued September 25, 1962, at 8:30 A.M., over the signatures of Judges Tuttle, Rives and Wisdom, which refers to, and is based in large part on, an order ostensibly of another panel, dated July 28, 1962. It is my opinion that neither of these orders was legally entered and that neither is an order the violation of which can be punished in the present proceeding.

I will discuss first the order of July 28th, which I think is void *inter alia* because it was not entered by an assembled court and because the mandate had been sent to the United States District Court for the Southern District of Mississippi, which court had exclusive jurisdiction of the action brought by James H. Meredith against Charles Dickson Fair, et al (No. 19475).

This Court filed its opinion on June 25, 1963, *Meredith et al v. Fair et al*, 305 F. 2d 343, reversing the decision of United States District Judge S. C. Mize, which denied the relief sought, and remanded the case to the District Court with directions that it issue an injunction as prayed for and that it retain jurisdiction. The mandate was in these words (By our order dated Feb. 15, 1958 "the mandate provided for in Rule 32 shall consist of a certified copy of the Judgment entered . . ."):

> "This cause coming on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi and was argued by counsel;
>
> "On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions that an injunction issue as prayed for in the complaint, the District Court to retain jurisdiction; . . .

DeVane, District Judge, Dissents.
June 25, 1962
Issued July 17, 1962."

The mandate so mailed July 17th was received by the clerk of the District Court in Jackson, Mississippi on the morning of July 18th, and was forthwith delivered to Honorable Harold Cox, Chief Judge of that court.

Thereafter, the appellees applied to the Judge of this Court resident in the State of Mississippi and senior member of the summer panel designated for that week (who was not a member of the panel rendering the opinion which formed the basis of the mandate) for the stay of the execution and enforcement of such judgment to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. Said Judge granted the stay in obedience to the provisions of 28 U.S.C.A. § 2101(f),[1] and the stay was served upon the court to which the mandate was directed and by which it would be executed and enforced and upon all other interested parties.

On July 20th, the clerk of this Court, by direction of one or more of the Judges of the panel which had decided

[1]"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . .

The stays thus issued by the single Judge of this Court were, in my opinion, valid, and could not be set aside by any panel or any other Judges of the Court; and the attempts to vacate the stay, or any of them, were, with deference, void and without effect.

the case, called upon the parties to file legal memoranda on the question *inter alia* whether the mandate should be recalled.

July 27th, an order was entered by said Judges headed "Order Vacating Stay, Recalling Mandate, and Issuing New Mandate Forthwith." The order was nine pages long and dealt chiefly with the right of the Court of Appeals to recall its mandate; it vacated and set aside the stay order of July 18th, recalled the mandate and issued a preliminary injunction couched in broad terms against the defendants-appellees.[2] On the following day, July 28, 1962, a further order was so entered reciting that, on July 26th [sic], an opinion and judgment had been entered vacating the stay and amending and reissuing the mandate, which order enjoined the appellees and a wide group of others to admit plaintiff James H. Meredith to the University of Mississippi, prohibited any act of discrimination against him, and ordering the District Court to enter an injunction in line with the amended instructions.[3]

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[2]". . . this Court herewith issues its own preliminary injunction . . ."

[3]The Order of July 28th contained this language:

"Now, therefore, the following injunctive order is issued:

ORDER

"Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University, the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree are expressly:

1.

"Ordered to admit the plaintiff James H. Meredith, to the University of Mississippi, on the same basis as other students at the University, under his applications heretofore filed, which are declared to be continuing applications, such admis-

These "orders" of July 27th and July 28th were issued, presumably, under authority of this language from Rule 32 of this Court:

> "The mandate once issued will not be recalled except by the court and to prevent injustice."

This language, in my opinion, refers to an *assembled court* duly empaneled and authorized by law to hear and decide cases. Cf. *Cowden v. Addis*, 5 Cir., 1932, 55 F. 2d 230. These orders were not considered or entered by an assembled court. For this reason they are, in my opinion, void. Other considerations which might bear on this question are that the entire Court had been in recess for many weeks, an order had been entered on the minutes of the books of the Court on July 19th recessing the Court for thirty days; regular vacation panels were appointed by the Chief Judge at the beginning of the summer recess and the order had been duly inscribed on the records of the Court, and the panel for the week beginning July 23, 1962 were Judges Cameron, Brown and Wisdom.

After the entry of the foregoing "orders" further stays of execution and enforcement of the several orders and mandates were granted by the same Judge; and, with the same informalities, an order was filed with the clerk by the original panel of Judges Brown, Wisdom and DeVane bearing date of August 4th (at which time the regularly constituted vacation panel consisted of Judges Cameron,

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sion to be immediate or, because of the second summer session having started, such admission to be in September, at Meredith's option, and without further registration . . ."

Jones and Bell), referring to the entry of the several previous orders and stays and concluding thus:

> "While it might appear to be unnecessary to enter any further orders, the Court now enters this order to make certain that the record is kept straight.
>
> "For the reasons pointed out in our opinion orders of July 27, 1962, the stay or stays granted by Judge Cameron on July 28 and July 31, 1962, were unauthorized, erroneous and improvident and each of them is hereby vacated and set aside forthwith. All of our orders of *July 17, July 27 and this date*, therefore, continue in full force and effect and require full and immediate obedience and compliance." [Emphasis added.]

From this it seems that the Judges constituting the original panel which heard the Meredith case were "straightening up" the record for the appeal so that it might include everything which was intended to be included; and that the order of July 28th, which now lies at the base of the criminal contempt charges, was eliminated from those orders which "continue in full force and effect."

Finally, it seems clear to me that when Mr. Justice Black — exercising such jurisdiction as was vested in him — vacated and set aside all of the stays which had been granted, the situation reverted back to its status at the time the first stay was granted. At that time, the mandate first above copied, being a certified copy of the judgment of this Court entered June 25th, was officially in the hands

of the District Court. In his opinion dated September 10, 1962, Mr. Justice Black discussed the various orders and stays coming after the service of the original mandate and stated:

> "I am therefore of the opinion that all of the stays issued by Judge Cameron should be and they are hereby vacated, and that the *judgment and mandate* of the Court of Appeals should be obeyed, and that pending final action by this Court on the petition for certiorari the respondents should be and they are hereby enjoined from taking steps to prevent enforcement of the Court of Appeals' *judgment and mandate*." [Emphasis added.]

The order entered by Mr. Justice Black on the same date refers likewise to the stays which had been entered on July 18th, July 28th, July 31st, and August 6th, and vacates those stays, and the paragraph so doing concludes: ". . . and that the *judgment and mandate* of said court shall be effective immediately." The final paragraph of the order reads:

> "It is further ordered that the respondents be, and they are hereby, enjoined from taking any steps to prevent enforcement of the United States Court of Appeals' *judgment and mandate* pending final action by this Court on the petition for writ of certiorari now on the docket." [Emphasis added.]

Copies of the opinion and orders of Mr. Justice Black was served by mail upon the clerk of the District Court

and were marked filed September 12, 1962. On the following day, September 13th, Judge Mize entered a judgment carrying out fully the mandate of this Court and the order of Mr. Justice Black. As far as I know, the content of the District Judge's judgment has never been challenged by anyone.

It is my opinion, therefore, based upon the foregoing facts, that the judgment of September 13th of the District Court is in all respects valid and binding upon the parties and that it is the only injunctive order which is, or ever has been, legal and binding, and that sole power is, and always has been since July 17, 1962, vested in said District Court.

II.

It is further my opinion that the order entered by this Court en banc dated January 4, 1963 is unenforceable for the independent reason that the temporary restraining order issued September 25, 1962, by a panel composed of Chief Judge Tuttle and Judges Rives and Wisdom, is void and unenforceable for the reasons set forth *infra*; and that the order now before us, based as it is upon said void restraining order of September 25th, can have and has no validity or legal status.

These are the facts. On September 24, 1962, this Court entered an order for an in banc hearing of the case of *James Howard Meredith, et al v. Charles Dickson Fair, et al* in these words:

"

ORDER

Pursuant to Rule 25(a) of this Court and Section 46(c) of Title 28 U.S.C., it is ordered by a majority of the Circuit Judges in active service that the above entitled and numbered cause on this Court's orders to show cause be considered by the Court en banc on Monday, September 24, 1962 at 11:00 A.M."

This order was signed by all of the Circuit Judges in active service on this Court except one who was excused for physical reasons. As stated in the order, it was entered pursuant to 28 U.S.C.A. § 46, which reads in part as follows:

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs. . . .

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service . . ."

Pursuant to the foregoing order by which a hearing before the Court in banc was ordered, the Court assembled in New Orleans and conducted in banc the following proceedings inter alia:

(1) On September 24, 1962, it heard extended evidence,

including an announcement by the Registrar of the University of Mississippi that he would be available in Jackson, Mississippi September 25, 1962 for the purpose of registering and admitting as a student of the University of Mississippi James H. Meredith in accordance with the order of this Court. It ordered that the members of the Board of Trustees comply fully with all of the terms of the Court's order of July 28, 1962, that it revoke and rescind the action taken September 20, 1962 appointing Ross R. Barnett, Governor, as its agent to act on all matters pertaining to such registration; and it required that the Board notify all University employees that all of the orders of this Court with respect to Meredith were to be complied with. It further ordered the Chancellor and other administrative officers of the University to admit Meredith to admission and continued attendance at the University as provided in the order of July 28th; that Registrar Ellis be present from one to four o'clock P.M. September 25, 1962 at the office of the Board of Trustees in Jackson, Mississippi to register Meredith; and it ordered that respondents report their actions to the Court in New Orleans not later than four o'clock P.M. of September 25th.

(2) September 25, 1962, at 3:40 P.M., the Court entered an order, in which Judge Gewin declined to join, amending the order of September 24th so as to permit the report of the respondents to be made before 6:00 P.M. of September 25, 1962.

(3) On September 28, 1962, it entered its findings of fact and conclusions of law and judgment of civil contempt against Ross R. Barnett (Judges Jones, Gewin and Bell dissenting in part) holding Barnett in civil contempt

of the temporary restraining orders of the Court entered September 25, 1962 declaring the contempt to be continuing, committing said Barnett to the custody of the Attorney General and to the payment of a fine of $10,000.00 per day, unless on or before Tuesday, October 2, 1962 at 11:00 A.M. he shows the Court that he is fully complying with the terms of the restraining orders, and that he has notified all law enforcement officers and all other officers to cease resistance to the orders of the Court and of the District Court for the Southern District of Mississippi, to maintain law and order at the University, and reserving the right to assert criminal contempt charges against respondents and to enter other orders as may be appropriate.

The findings of fact were based upon the verified application of the United States and of appellant Meredith and evidence heard in the absence of respondent Barnett. The basis for the findings was asserted to be the orders entered on September 25, 1962.

(4) On October 2, 1962, it entered an order vacating and dismissing the citation for civil contempt as to the President and each of the members of the Board of Trustees of Institutions of Higher Learning, and finding that the Chancellor and the other executive officers of the University had not been in civil contempt of the Court. The order also continued until October 12th the matter of the entry of further orders as to the civil contempt of Governor Ross R. Barnett or Lieutenant Governor Paul B. Johnson, Jr., as well as the motion for preliminary injunction and all other motions pending in the cause.

(5) On October 12, 1962, the Court heard evidence (upon

which it entered an order dated October 19) on its order to show cause why a preliminary injunction should not be granted, on the motion filed by the State of Mississippi to dissolve the temporary restraining order entered September 25, 1962, and to dismiss the proceedings which had resulted in a judgment of civil contempt against Ross R. Barnett. The Court found that the proceedings it was engaged in hearing "are purely ancillary to the original lawsuit, and this Court has ample power to proceed against any party, including the State of Mississippi, which is shown to be engaged in a willful, intentional effort to frustrate this Court's injunction." The Court denied the motion to dissolve the restraining order and to dismiss the contempt proceedings and issued an injunction against the Attorney General of Mississippi and eight other persons, struck down several proceedings which had been commenced in the courts of Mississippi, and enjoined in very sweeping terms all persons who received actual notice of the injunction from interfering with, injuring, harassing or intimidating James Howard Meredith in connection with his attendance as a student in the University of Mississippi.[4]

[4]The following language used in this injunction of October 19, 1962 is taken largely from criminal statutes carried as 18 U.S.C.A. §§ 1509 and 1503 and is copied here for reference at a later place in this opinion.

"4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962, and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

"5. Interfering with or obstructing by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of or obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; . . ."

(6) On November 15, 1962, it entered an order, Judge Gewin dissenting, reciting that the United States as amicus curiae had filed on November 6, 1962, a memorandum suggesting that the taking of further evidence concerning the actions of Ross R. Barnett would be appropriate with respect to the issue of whether he had purged himself of civil contempt; that "it appeared to the Court from the pleadings filed and the oral testimony and documentary evidence already adduced in the proceedings on the petitions for temporary restraining order and for preliminary injunction and the civil contempt proceedings heretofore instituted against Ross R. Barnett and Paul B. Johnson, Jr., that proceedings should be instituted against the said Ross R. Barnett and Paul B. Johnson, Jr. to determine whether they are, or either of them is, guilty of criminal contempt of the orders of this Court . . ." The Court concluded the order by appointing the Attorney General of the United States "and such attorneys in the Department of Justice as he may designate" to institute and prosecute criminal contempt proceedings against said Barnett and Johnson "pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of this Court of September 18, 1962."

(7) On December 21, 1962, the representatives of the United States responded to that order and filed an application for an order requiring Ross R. Barnett and Paul B. Johnson, Jr. to show cause why they should not be held in criminal contempt. The caption bears the number of the Meredith case and the caption both of *James H. Meredith, Appellant v. Charles Dickson Fair, et al, Appellees,* and *United States of America, Amicus Curiae and Petitioner, v. State of Mississippi, et al, Defendants.* The application is

nine pages long, and charges the two defendants with various violations of this Court's restraining order of September 25, 1962 in disobedience of this Court's order of July 28, 1962 and the District Court's order of September 13, 1962. Much of the language used in the charge is taken verbatim from the sections of the Criminal Code referred to in footnote 4, supra.

Acting on said application, this Court entered its order dated January 4, 1963 and marked filed January 5, 1963, reciting that a majority of the Circuit Judges in active service had voted to consider the matter by the Court in banc, that a court in banc is designated for the consideration of all matters relating to criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr. The order bears a new number, 20240, and is styled *United States of America v. Ross R. Barnett and Paul B. Johnson, Jr.*, and was signed by the Chief Judge of this Court.

An "Order to Show Cause Why Ross R. Barnett and Paul B. Johnson, Jr. Should Not Be Held in Criminal Contempt," also filed January 5, 1963, and signed by a majority of the members of this Court, recites that the two defendants had violated the temporary restraining order of September 25, 1962 in disobedience of this Court's order of July 28, 1962 and the District Court's order of September 13, 1962; and orders said defendants to appear before the Court on February 8, 1963 to show cause why they should not be held in criminal contempt. Much of the language of this order is couched in the same words as the sections of the Criminal Code referred to in footnote 4, supra.

From this recital it is clear that, on September 24, 1962 and pursuant to the order of that date, this Court in banc took exclusive jurisdiction and charge of the civil contempt

proceedings of *Meredith v. Fair, et al* and of the proceedings filed and taken therein by the United States as *amicus curiae*, and said cause is still pending before the Court in banc.

It is further clear that, by virtue of its two orders filed January 5, 1963, it took exclusive jurisdiction of the criminal contempt proceedings against the defendants Barnett and Johnson, and conducted a full hearing on February 8, 1963, in connection with which these proceedings are progressing.

As of September 24, 1962, therefore, and to this moment, all aspects of the litigation growing out of or connected with the action brought by James H. Meredith and carried on and participated in by the United States of America have been exclusively within the in banc jurisdiction of this Court.

Notwithstanding these facts, Chief Judge Tuttle and Judges Rives and Wisdom, assuming to function as a panel of this Court, essayed to enter three orders on September 25, 1962 between the time of the in banc order of September 24th and the in banc order of September 25th, items (1) and (2), supra. An order was entered by them on September 25th reciting:

> "Upon the application of appellant which is appended hereto:
>
> "It is hereby ordered and decreed that Ross R. Barnett, Governor of the State of Mississippi, is added as party defendant in this cause in this Court."

A temporary restraining order was issued by them on September 25, 1962 at 8:30 A.M. upon the application of appellant Meredith enjoining Ross R. Barnett, Governor, and others from proceeding with criminal and civil actions pending in the state courts of Mississippi and from applying for any other injunctions therein and from ordering any state official to arrest, obstruct or otherwise interfere with the freedom of movement of the appellant. The order also required that Governor Barnett appear before the Court in the City of New Orleans on October 5, 1962 at 10:00 A.M. and show cause why he should not be made a party in this case and why a preliminary injunction should not issue.

At 8:30 A.M. on the same day, they issued a temporary restraining order — *which is the restraining order the defendants are here charged with disobeying* — upon the verified petition of the United States as *amicus curiae* against the Governor, the Attorney General, the Commissioner of Public Safety, the District Attorney of Hinds County, the District Attorney of Lafayette County and a number of other officials, including all district attorneys in Mississippi, the sheriffs of all the counties of Mississippi, and all chiefs of police, constables and town marshals enjoining them from arresting James Howard Meredith, or prosecuting him further, or from injuring, harassing, threatening or intimidating him, or obstructing him by any means from enjoying his rights "under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962 in this action."

The restraining order was couched in large part in the

language of sections of the Criminal Code, which language was copied into the injunction of October 19. See footnote 4, supra.

In addition, Judges Tuttle, Brown and Wisdom signed an order on September 26, 1962, upon Meredith's motion, directing Governor Barnett to appear before the Court on September 28th to show cause why he should not be adjudged in civil contempt of the orders of the Court. On the same date — I do not find in the record that Lieutenant Governor Johnson was ever made a party to the action — Judges Rives, Brown and Wisdom signed an order upon the application of the United States as *amicus curiae*, ordering Johnson to appear and show cause on September 29, 1962 why he should not be held in civil contempt of the restraining order of September 25, 1962 (which, in turn, enforced the order of July 28, 1962 of this Court and the order of September 13, 1962 of the District Court).

In my opinion, this Court in banc had sole jurisdiction to proceed in this action and all phases of it from the time of the entry of the in banc order of September 24th. It follows that the three Judges who signed the five orders last above listed had no power or jurisdiction to sign or enter them, and that said orders and each of them are wholly null and void.[5]

These orders constitute the very bases of the proceedings

[5]This Court was in recess, except as a court in banc for the hearing of the Meredith case, the entire month of September, 1962. The recess panel duly created by court action at the beginning of the summer recess with jurisdiction on September 25th was composed of Chief Judge Tuttle and Judges Cameron and Bell.

now before us; and said orders being entirely void, the Court is, in my opinion, not empowered to proceed or to take any action in connection with the attempted prosecution of Governor Barnett and Lieutenant Governor Johnson for criminal contempt of court.

III.

(a) The language of the basic statutes governing the proceedings before us, together with the decisions of the Supreme Court in the two Gompers cases[6] — which have been accepted as fundamental by the courts ever since their publication — in my opinion, reject the power of this Court to proceed with the enforcement of its criminal contempt order of January 4, 1963. No better dissertation upon civil contempts and criminal contempts and the difference between them could be compiled than is afforded by quotations from the two *Gompers* cases. In fact, these two cases represent the first real effort of the courts to differentiate the two.

First *Gompers* involved an equity suit for an injunction between Bucks Stove and Range Company and Gompers and other individuals who were officers of the American Federation of Labor in proceedings before the trial (the Supreme) court in the District of Columbia for contempt of court for violation of orders entered by the trial court. The details are not important, but the case resulted in a finding of the trial court and an affirmance by the Court of Appeals that Gompers et al had been guilty of criminal contempt for violating the order of the Supreme Court of

[6]Gompers v. Bucks Stove & Range Co., 1911, 221 U. S. 418, and Gompers v. United States, 1914, 233 U. S. 604.

the District. The Supreme Court of the United States wrote extensively of the difference between civil and criminal contempt and set up standards which are involved in the proceedings before us. I quote excerpts from that decision:

> [P. 443] "In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, [p. 444] but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience . . .
>
> "But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine and twelve months, no relief whatever was granted to the complainant, and the Bucks . . . Company took nothing by that decree.
>
> "If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed *only in a proceeding instituted and tried as for criminal contempt.* . . . Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the *defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.* . . .
>
> "There is another important difference. Pro-

ceedings for [p. 445] civil contempt are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for *criminal contempt are between the public and the defendant, and are not a part of the original cause.* . . .

"The Bucks . . . Company was not only the nominal, but the actual party on the one side, with the defendants on the other. The Bucks . . . Company acted through or as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and *not as a representative of the United States, prosecuting a case of criminal contempt* . . .

[446] "In the first place the petition *was not* entitled *'United States v. Samuel Gompers, et al.'* or *'In re Samuel Gompers, et al.,' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt.* This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings *ought to be able to see whether it was instituted for private litigation or for public prosecution,* . . . He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be *informed of the nature of the charge against him, but to know that it is a charge and not a suit.* . . .

[447] "It is argued the defendants' answers concluded with a statement that as questions of criminal and quasi-criminal intent were involved, a jury was better qualified to pass on the issues than a judge, and in the event he should be of opinion that the charges had not been sworn away, they moved *that issues of fact should be framed and submitted to a jury.* Such a motion was not inconsistent with the theory that this was a proceeding for civil contempt in equity, but *was in strict accord with the practice under which questions of fact may be referred by the chancellor to a jury for determination.* . . . [And cf. Rule 39(c), F.R.C.P., providing that a court may, of its own initiative, try any issue with an advisory jury.]

[P. 448] ". . . the provision of the Constitution that 'no person shall be compelled in any criminal case to be a witness against himself' *is applicable, not only to crimes, but also to quasi-criminal and* penal proceedings. . . .

[P. 450] "Congress in recognition of the necessity of the case has [p. 451] also declared (Rev. Stat., § 725) that the courts of the United States 'shall have power to punish by fine or imprisonment contempts of their authority . . .' including 'disobedience by any party to any lawful order . . . of the said courts.' But the *very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper* . . . .

"If this had been a *separate and independent proceeding involved at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other,* it could not . . . have been affected by any settlement which the parties to the equity cause made in their private litigation . . .

[P. 452] "The judgment of the Court of Appeals is reversed, and the case remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the case to that court with direction that the contempt proceedings instituted by the Bucks . . . Company be dismissed, but without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding, contempt, if any, committed against it." [Emphasis supplied.]

(b) When the case got back to the trial court, *it appointed a committee* — here, the Department of Justice — "to inquire whether there was reasonable cause to believe the plaintiffs in error guilty, in willfully violating an injunction issued by that court . . if yea, to present and prosecute charges to that effect. The inquiry was directed solely with a view to *punishment for past acts, not to secure obedience for the future;* . . .

[233 U. S. p. 606] "The committee . . . reported and charged that the parties severally were guilty of specified acts in violation of the injunction, being the same acts of which they had been found

guilty by the Supreme Court in the former case . . . The defendants pleaded the Statute of Limitations, Rev. Stat. § 1044, as to most of the charges, ... There was a trial, the Statute of Limitations was held inapplicable and the defendants were found guilty and sentenced to imprisonment . . ."

The Supreme Court denied the petition filed by the Judges of the trial court, assumed that the evidence required a finding that the defendants were guilty, but reversed the decision solely upon the application of the Statute of Limitation, which provides that *"no person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."* In holding the quoted Statute of Limitations applicable, the Supreme Court used this language:

[P. 610] "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc. to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. . . . *It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses,* because trial by jury as it has been gradually worked out and fought out has

been thought not to extend to them as a matter of constitutional right. *These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.* So truly are [p. 611] they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure [citing several English cases and cases from the Supreme Court]. . . .

"We come then to the construction of the Statute. . . . and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information; a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries. . . . The substantive portion of *the section is that no person shall be tried for any offence not capital except within a certain time.* Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within 3 years; *indictment and information being the usual modes by which they are begun and very likely no other* having occurred to those who drew the law. But it seems to us plain that the dominant words of the act are 'no *person shall be prosecuted, tried, or punished for any* offense not capital' unless. —

"No reason has been suggested to us for not giving to the [612] statute its natural scope. The Eng-

lish courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. . . . Indeed the punishment of these offences peculiarly needs to be speedy if it is to occur. The argument loses little of its force *if it should be determined hereafter, a matter on which we express no opinion, that in the present state of the law an indictment would not lie for a contempt of a court of the United States.*

"Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, *if not by Congress by this court.* The power to punish for contempt must have some limit in time, and in defining that limit *we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment the limit is three years. . . ."* [Emphasis added.]

(c) These words of Justices Lamar and Holmes have served as guidelines since their utterance a half century ago. The language of these two cases, it seems to me, spells out categorically that the prosecution of the offense of criminal contempt before us must be conducted in conformity with the laws of the United States governing prosecution for crimes, whether those laws are derived from statutes or from "what has been the policy of the law from the foundation of the Government." It is further clear that, if a statute does not specifically cover such a

policy, the court should conform its practices by analogy with that policy so as to insure these defendants the same protections and immunities which would surround them if they were prosecuted for crime in a conventional proceeding.

The two *Gompers* cases and others listed in the margin[7] hold specifically that one accused of the offense of criminal contempt of court is entitled to the following protections and immunities *inter alia:* the presumption of innocence; proof beyond a reasonable doubt; not compelled to testify against himself; advice as to the charges against him; a reasonable opportunity to prepare a defense; the benefit of compulsory process; assistance of counsel; an impartial arbiter of the facts; benefit of the statute of limitations governing crimes; the right to a pardon under the President's constitutional authority to pardon criminal offenses. Additionally, of course, contempts of Congress are punishable by normal criminal procedures.

Against this background should be considered certain of the more important actions taken by the prosecution and some of the more crucial statutes involved.

(d) It has been shown that the vital entry of the United States into the civil case by the order of September 18th was accomplished without observance of Rule 24(c), F.R.C.P. It is further manifest that the entry of the Government lies without any statutory authority and was in

[7]Cook v. United States, 1925, 267 U. S. 517; Ex parte Grossman, 1925, 267 U. S. 87; and In re Murchison, 1955, 349 U. S. 133; and see authorities cited in dissenting opinion, Ballantyne v. U. S., 5 Cir. 1956, 237 F. 2d 657, 666 et seq.

fact accomplished in derogation of the general statute granting to the United States the right to commence a civil action in a court of the United States. 28 U.S.C.A. § 1345:

> "Except as otherwise provided by Act of Congress, the *district court* shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." [Emphasis added.]

The entry which the United States attempted to make in the Court of Appeals is not, as far as I can find, authorized by any Act of Congress and none is claimed by the opposition. As my Brothers have amply shown, Congress has not authorized the Government to enter any segregation case as a litigant and, as I understand it, the opposition does not contend otherwise. The claimed entry by the United States under the order of September 18th, not to be confused with its commencement of this criminal proceeding by filing of its information of December 21, 1962. On September 18th, nothing but a civil proceeding brought by Meredith was pending, and the opposition has pointed to no authority as far as I can find for that intervention.*

*The expansive language of the Gompers cases and the others listed, in my opinion, cloak these defendants with all Bill of Rights protections (we omit trial by jury from the present discussion). Inasmuch as power to prosecute for criminal contempt is based on the validity of the civil proceedings, I question, for example, the validity of the restraining order of September 25th, which was entered without the presence of the defendants, outside of the State of Mississippi; and the initiation of this proceeding upon a show cause order entered outside said State in derogation of Article III, Section 2, Clause

(e) The Government admits that no prosecution for criminal contempt has ever been conducted in a Court of Appeals and the only case in which any appellate court has ever conducted a criminal contempt hearing is *United States v. Shipp*, 1906, 203 U. S. 563; 1909, 214 U. S. 386; 1909, 215 U. S. 580. I will digress at this point to say that, in addition to the infirmities my Brothers have pointed out, it should be noted that the prosecution there was solely of violation of an order entered by an appellate court dealing with an exclusively appellate matter. Before the Supreme Court had taken up the merits of the case, in order to protect its jurisdiction upon appeal and prevent it from being entirely sterile, it stayed the execution of the condemned man until it could pass on the questions presented to it upon appeal. The only order violated was the order of the Supreme Court, and no other court had any possible jurisdiction to punish the violation of that order. We have, of course, no such situation before us.

I think it proper to digress further to say that I do not think that the opinion of the opposition has the question of jury trial in proper focus. An examination of the *Shipp* record, as reported with the opinions, will reveal that those charged with violating the Supreme Court's stay order did not ask for trial by jury, that question not being mentioned either in the motions or the brief of the accused or in the court's opinion.

Getting back to the mainstream of the debate on the

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3 and the Sixth Amendment of the Constitution of the United States; and cf. Rule 18 F.R.Cr.P., infra. This opinion is drawing out to such lengths, however, that I will not pause to consider these possible infirmities here.

question before us, it is clear to me that this Court is, and has been from the time it sought to recall its mandate, acting wholly beyond the jurisdiction vested in it by Congress. Professor Moore, in his Commentary on the United States Judicial Code, gives a detailed account of the history and jurisdiction of the Court of Appeals, § 0-03 (51), pp. 455, et seq. Having stated that the Evarts Act of 1891 created a Circuit Court of Appeals for each of the nine circuits into which the United States was divided, and pointed out that this number had increased to eleven, he states (p. 456) the following:

> "Courts of Appeals have only appellate jurisdiction.
>
> "Since the courts of appeals are created by Congress and not by the Constitution, Congress could confer original jurisdiction upon them, but it has not done so. They have an exclusively appellate jurisdiction. [The text then quotes the following from Supreme Court decisions]
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> "Whitney v. Dick (1906) 202 U. S. 132, 137 . . . 'It will be borne in mind that the Circuit Court of Appeals, which is a court created by statute, Kentucky v. Powers, 201 US 1, 24, is not in terms endowed with any original jurisdiction. It is only a court of appeal.'; A F of L v. NLRB (1940) 308 US 401, 404 . . . ('The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts . . . Such jurisdiction as it had, to review directly the action of ad-

ministrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review." Certification by NLRB of a particular labor union as the collective bargaining representative held non-reviewable in Court of Appeals.)."

Professor Moore then discusses in the succeeding pages certain jurisdiction to review and otherwise handle matters relating to administrative agencies and special boards, including Tax Court decisions, decisions of courts of bankruptcy, orders of the Interstate Commerce Commission, Federal Communication Commission, Civil Aeronautics Board, final orders of the National Labor Relations Board, orders of the Administrator of the Wage and Hour Division of the Department of Labor, and many others. He also discusses, pp. 467, et seq., the jurisdiction of a court of appeals in connection with § 1651, the All Writs Statute, and its power in such proceedings as mandamus, prohibition, habeas corpus, etc.

(g) Jurisdiction of courts of appeal is now dealt with in 28 U.S.C.A. §§ 43 and 1291, et seq. This Court, in my opinion, exhausted its jurisdiction when it reversed the decision of the District Court and remanded the case of James H. Meredith to that court with instructions to enter an injunction as prayed for. Meredith had filed his civil action asking for injunctive relief, and the District Court had denied the relief prayed for; Meredith appealed to this Court; this Court reversed and remanded the case with instructions as to the order which should be entered. There its jurisdiction ceased.

It could not, in my opinion, as an appellate court take hold of the case and essay to exercise the jurisdiction vested only in district courts. When it attempted to do so, the weaving of the tangled web began, and the Court has, in my opinion, been in a state of confusion ever since. Of course, the web had been woven when the Court in banc took hold. In my judgment the moves made and the actions taken leading up to and including the issuance of the citation against the defendants charging the offense of criminal contempt have been beyond the power and jurisdiction of the Court.

(h) Assuming that all I have written is in error and that what the Court has been doing has been in an effort to enforce its legal order in fulfillment of its appellate jurisdiction, its power extended, in my opinion, no further, in any event, than the issuance and enforcement of civil contempt proceedings. Much of what the courts have said and the text-writers have repeated has been in justification of the right of a court to protect itself, and certainly I do not have a word to say against that right. But the right is limited to direct contempts and to enforcement of its orders rendered in the execution of its appellate jurisdiction. Moreover, even if it had the right to enforce by civil sanctions its orders in this case, certainly it has done so in a very adequate way. It did not enforce its imposition of the large fines and the sentencing of the defendants to imprisonment, apparently because the things the Court was trying to accomplish had already been satisfactorily performed. But the punishment for criminal contempt is entirely another matter and one not, in my opinion, of which this Court has jurisdiction.

(1) General jurisdiction of prosecutions for offenses against the United States is lodged by statute solely in the district courts, 18 U.S.C.A. § 3231:

> "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

It is provided in Rule 18 F.R.Cr.P.:

> "Except as otherwise permitted by statute or by these Rules, the prosecution shall be had in a district in which the offense was commited, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

These decisions and the statutes and rules of procedure referred to make it plain that the only place this offense can be prosecuted is in the district court where it originated, was tried, and to which it was remanded, and where an injunctive order was entered in obedience to the mandate of this Court as soon as Mr. Justice Black vacated the stays which were holding up its entry. Strangely enough, every important order entered in this proceeding in this Court has referred to the District Court's injunction of September 13th, *and has required the enforcement of the District Court's injunction,* along with the orders entered by this Court which the opposition strains so hard to justify.

If criminal contempt of court is an "offense" within the meaning of the statute of limitations, *Gompers,* supra, it certainly is no less an "offense" the punishment of which is vested in the district courts, 18 U.S.C.A. § 3231; and, in

my opinion, this Court thus has no jurisdiction to hear original prosecutions for the offense of criminal contempt.

(j) I have grave doubts, moreover, that the acts with which the defendants are charged are criminal contempts of court, inasmuch as the same acts are indictable "crimes" under 18 U.S.C.A. §§ 1503 and 1509. It is important that acts which *are* crimes not be confused with acts which also *amount* to crimes, e.g., impeding an officer of the court may also *amount* to an assault and battery, but it may be a crime under 18 U.S.C.A. § 1503.

I am not unaware of *Savin, Petitioner*, 1889, 131 U.S. 267, which held that the fact that the offense charged was a crime, punishable by indictment under the then § 725 (taken from § 2 of the Contempt Act of March 2, 1831), did not preclude punishment for criminal contempt. But *Nye v. United States*, 1941, 313 U.S. 33, written after this whole question had been clarified by statutes and decisions, casts great doubt on that holding:

> [P. 49] "Yet in view of the history of these provisions, meticulous regard for these separate categories of offenses must be had . . . [or] The result will be that offenses which Congress designated as *true crimes* under § 2[9] of the Act of March 2, 1831 will be absorbed as contempts wherever they take place." [Emphasis added.]

The later opinions of the Court tend to sustain the thesis

[9]28 U.S.C.A. §§ 1503, 1509 are the progeny of § 2 of the Act of March 2, 1831. See footnote 4, supra, for the acts enjoined in this case — acts which would be a violation of the statutes.

that, when Congress makes certain acts specific criminal offenses, such acts are no longer punishable as criminal contempts of court but as crimes; and if defendants are to be punished, it "must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions." *Nye*, supra, at p. 53.

(k) The opposition's opinion claims that the right of this Court to punish the defendants for the criminal offense here charged results from the "elementary" fact that this Court has exclusive jurisdiction so to punish. It cites as authority for this view three cases of rather ancient vintage. *In re Debs*[10] was part of the spacious litigation brought by the United States against Debs and others, officers and members of the American Railway Union, the suit being brought under the Interstate Commerce Act. An injunction was issued commanding the defendants and a large number of others to refrain from interfering with or obstructing the operation of the trains of the twenty-two railroads listed in the original complaint. The main question argued was whether the United States could bring a suit involving the private property of the railroads on the ground that interference with their efficient operation, particularly with respect to the carriage of mail, was cognizable under the Interstate Commerce Act.

The court of first instance granted an injunction because of "interferences, actual or threatened, with property rights of pecuniary nature." Debs et al were cited for violating that injunction by "disobedience to an order of a civil court, made for the protection of property and the security of

[10] 1895, 158 U. S. 565, 595.

rights." The Supreme Court, in a habeas corpus proceeding, merely affirmed the action of the trial court in punishing the violation of the injunction. It is difficult to tell from the language of the opinion whether the punishment of the offense was considered civil or criminal in character. The fact is that the difference between civil and criminal contempts seems not to have been understood, certainly was not made explicit, until the two *Gompers* cases, supra. I find nothing in this case to sustain the opinion of the opposition that this Court of Appeals has jurisdiction to entertain a prosecution for criminal contempt.

The other Supreme Court case, *Ex parte Bradley*, 1868, 74 U.S. 368, et seq., involved disbarment of an attorney by the Supreme Court of the District of Columbia. The disbarment was based upon "contemptuous language towards the said judge in the progress of a trial therein, and for which the said justice disbarred him from the privileges of attorney and counsel of the Supreme Court." The holding that this contempt, actually committed in the presence of a judge of the Supreme (trial) Court, while holding a term of the Criminal Court, must be disposed of by that Criminal Court and not by the same judges of the Supreme Court of the District of Columbia, sitting as a civil court, does not support what the opposition contends for here.

The only other case mentioned is an ante-bellum case from Mississippi.[11] That case arose in the administration of an estate, and a fiduciary refused to comply with the order of the court. The language of the order is that "contemptuously refusing to comply with the order of the court

[11] Watson v. Williams, 1858, 36 Miss. 331.

in the presence of the court, he was, by the order of the court, committed to the jail of said county, *until he should comply with said order.*" [Emphasis added.] This order was simply the conventional enforcement of a court order by imprisoning the intransigent person until compliance was had. Of course, that action must be taken by the court which entered the order — a trial court in this instance. Interestingly enough, the main issue in the case was whether or not appeal should lie from such an order, and the appellate court held that there could be no appeal from such an order of contempt, a holding in line with the common law rule of that era which did not permit review of a finding of contempt.

These cases hold merely that a *trial* court may punish for criminal contempt.

It does not follow from those cases that, under the circumstances here present, the Court of Appeals is, by the attempted tacking on of the order of this Court to the September 13th order of the District Court, vested with exclusive jurisdiction, or with any jurisdiction at all, to punish for the alleged criminal contempt.

IV.

I join with the other members of the Court in submitting the question of trial by jury to the Supreme Court. Since jurisdiction affects the right of this Court to try this prosecution at all, I have felt constrained to set down, supra, my reasons for believing that this Court has no jurisdiction before beginning a brief discussion of the matter of trial by jury.

The defendants, of course, filed other pleadings presenting many legal questions in addition to challenging the jurisdiction of the Court (and in addition to other grounds relied on as to the jurisdictional question). These include those listed in the opinion of the opposition. While a majority of the Court voted to reject those contentions, I thought in many cases they were meritorious. I understand that these questions will not be foreclosed by the action which the Supreme Court takes with respect to the questions presented to it.

V.

The right of defendants to be tried by a jury has been well justified by the able opinions of Judges Jones, Gewin and Bell, the reasoning of which I adopt and will try to avoid repeating.

There being no statute specifically vesting power in this Court to hear this prosecution for the criminal offense charged and no precedent establishing the legal mechanics for conducting such an action, those who seek to justify the present procedures are relegated, it seems to me, to the language of the last clause of 18 U.S.C.A. § 402, quoted in the opinion of the opposition:

> " . . . and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

What, then, are these prevailing usages at law to which this Court must conform if it sets itself the task of meting out punishment to these defendants? The question, it

seems to me, is answered by Mr. Justice Holmes in second *Gompers*, supra: " . . . we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment . . . " we should proceed to fashion the rules by which we shall be guided.[12]

A few words may be added to what my Brothers say concerning the question whether the Government's entry into Meredith's civil action, by the order of September 18th, constituted a "suit or action brought or prosecuted in the name of, or on behalf of, the United States."

The amorphous, hybrid role it assumed in its request for admission constitutes a slender reed upon which to rest its status. The essence of the role of friend to the court is the possession of the same objectivity and detachment which belong to the Court. Friend of the court and partisan litigant are mutually exclusive terms. As friend, the Government could not bring or prosecute an action.[13]

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[12] Mr. Justice Holmes makes it plain that, before the foundation of this Government, our English forebears "had adopted the procedure of trying criminal contempts in the same manner in which other charges of crime were tried.

[13] The Department of Justice has never been objective in a segregation case. In both Brown cases, presenting as they did sociopolitical questions upon which the nation was divided, it took sides. In the former case, it is stated in 347 U. S. at page 485: "By special leave of Court, Assistant Attorney General Rankin argued the case for the United States on the reargument, as amicus curiae, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were Attorney General Brownell . . . James B. McGranery, then Attorney General, and Phillip Elman filed a brief for the United States on the original argument as amicus curiae, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10." And see 349 U. S. at page 297, the notation that Solicitor General Sobeloff participated in the oral argument for the United States and that with him on the brief were Attorney General Brownell and others representing the United States."

The Department of Justice has tried in a number of Con-

No statute has been referred to giving the United States the right to enter private civil litigation to assist either of the parties. In his dissenting opinion in the *Green* case[14] Mr. Justice Black lists a number of instances in which Congress has provided for the bringing and prosecution of actions in the name of and on behalf of the United States. Through Congress alone can the Government derive the right to litigate in the courts. It is perfectly plain, I think, that the phrase "actions brought or prosecuted in the name of the United Sttaes" refers only to those actions which may be brought under congressional authority.[15]

The usages of law existing at the time the Government supposedly brought its case are not difficult to discover, as they relate to trials of criminal contempts. Criminal contempts have been since the beginning of the Government universally brought in the district courts (*Shipp* being the only exception); under the practice in the district courts it is likewise universal that defendants in such proceedings are entitled to be tried by a jury if the act constitutes also a criminal offense under any statute of the United States or under the laws of any State in which the act is committed. That right has been given ever since 1914, when the Clayton Act was passed. That Act applied, of course, only to injunctions in labor disputes. Ever since then every statute passed by Congress and every court decision has tended to enlarge the scope of the right to trial by jury.

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gresses to obtain the right to bring segregation suits and it has taken a partisan part in a large number of cases, as reference to the Reports will show. I know of no instance in which it has functioned objectively in such a case.

[14]Green v. United States, 1958, 356 U. S. 165, 208.

[15]In addition, as noted supra, the United States can bring a civil action only in the district courts. 28 U.S.C.A. § 1345.

When Congress passed the Civil Code of 1948, it provided, by 18 U.S.C.A. § 3691, that the rights previously belonging to those involved in labor disputes were universally given to all persons charged with criminal contempt. When the right to jury trial came up in the passage of the Civil Rights Act of 1957, 42 U.S.C.A. § 1995, the abridgement of the right to trial by jury was severely limited. Finally, Congress, in 1960, passed 18 U.S.C.A. § 1509.[16] Whatever may have been the purpose of Congress in passing this Act, the effect of it certainly was to combine with 18 U.S.C.A. § 1503 so as to make practically every interference with an injunctive order of a court a crime punishable under criminal laws. Whatever the court, therefore, usage gives a jury if the alleged contempt is a crime also.

This evolution in dealing with criminal contempts is, in my opinion, a logical one. The courts are fully protected by the statutes regulating direct contempts, and by the right to coerce obedience of injunctive orders by commitment for civil contempt, which is apparently limitless in the provision for imprisonment.

VI.

After a court's order has been enforced, by whatever means, it loses all interest in dealing with those who inter-

[16] "Obstruction of court orders

"Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"No injunctive or other *civil relief* against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime." [Emphasis added.]

fered with its enforcement. This Court has no interest in the punishment of these defendants for past criminal offenses committed by them. Society alone has such an interest. Society has chosen throughout the life of this government to punish crime by prosecution in the criminal courts under protection of the Bill of Rights. It provides no other method for such punishment and, in my opinion, this Court has no duty to perform and no interest in what society does to these defendants.

REJOINDER

The four Judges opposing trial by jury of these defendants properly undertook the role of proponents and filed their opinion first. Since a good part of the supplementary comments of the opposition deal with the opinion prepared by me, I feel that it is proper that I undertake to respond to the new matter brought in by the supplement they have filed.

The opposition takes the position that the stays granted by me, particularly the first one of July 18th, had the effect of frustrating the will of the panel which had ordered the District Court to enter the injunction Meredith had prayed for. The position is further taken that this Court was left helpless unless it adopted the novel and unprecedented procedures embraced in the panel's orders of June 27-28. I do not believe that this position, taken first by the original panel of Judges Brown, Wisdom and DeVane and now adopted by the opposition, is justified.

The fact is that the record does not disclose that the District Court ever refused to carry out the original mandate,

or ever took any step indicating that it would not faithfully obey any legal mandate the panel might issue. On July 20, two days after the original mandate had been received by the District Court and had been stayed by my order of July 18, the panel caused telegrams to be sent to the litigants requesting five-day briefs on whether the mandate should be recalled and other steps taken in this Court, thus holding in abeyance any action on the mandate by the District Court. Nine days after the District Court received the mandate the panel issued its order of July 27th the exact effect of which, as I see it, no one has even explained. It seemed to place this Court in the driver's seat astride the District Court, leaving the District Court with no specific instructions and in effect with no discretion to act except specifically as the panel should direct. The District Court was then faced with successive stays issued immediately after new orders were issued by the panel. The final order of August 4th made it clear that the whole matter was to be subjected to some appellate procedure. It would have been a very unusual and presumptuous act if the District Court had essayed to enter any order under the existing circumstances.

It is probably worthwhile to digress from the main theme to consider the exact nature of the impediment which the opposition regards as preventing other proceedings by the District Court. It was undoubtedly confronted with stays which on their face were issued under authority of the statute,[17] and nobody has cited any decision casting any doubt upon the validity of the stays. On the other hand, the lower court was faced with the recent decision of the Supreme

[17] 28 U.S.C.A. § 2101(f).

Court in *Rosenberg et al v. United States*, 1953, 346 U.S. 273, which I think justified the stays.

After a bizarre array of motions, applications for stay, for relief under § 2255, and other like efforts had been presented by the petitioners there, the Supreme Court finally held a special session after its recess on June 15th and put an end to all proceedings pending in connection with the effort to save the petitioners from execution. After that Court had adjourned for its summer recess, Mr. Justice Douglas was importuned to grant a stay based upon questions which it was claimed had not theretofore been raised, and he finally granted the stay of execution. Upon the Government's request, the Supreme Court convened in special session, heard on the merits the new questions raised and vacated the stay granted by Mr. Justice Douglas upon its decision of those questions. But every Justice agreed that Mr. Justice Douglas had properly issued the stay and the Court held that it could be vacated only by its decision of the question preserved by the stay. The District Court here was justified in acting on the assumption that the stays in the Meredith case, pending in the Supreme Court upon petition for certiorari, could be vacated only by similar action. And cf. *Application of Chessman*, 1954, 75 Cal. S.Ct. 85, 274 P. 2d 645, certiorari denied 348 U.S. 864.

I revert now to the opposition's claim that the panel had no alternative except taking the extreme action represented by the unprecedented proceedings of July 27-28. Its opinion here says, in Note 7:

> "With the successive stays of Judge Cameron (vacated by our several orders), the District Court

was, or thought itself, unable to take action. Unless this Court's decision of June 25 was to be frustrated, affirmative action was needed then and there. It had to come from and through this Court, and this Court alone. Hence the injunctive orders of July 27-28 were imperatively required."

The decision of June 25th, 305 F. 2d 343 at 361, required only that "the District Court issue the injunction as prayed for in the complaint, the District Court to retain jurisdiction." If the stays were without legal basis, and the District Court had refused to follow the panel's mandate, the panel had the simple and traditional power to enforce its decision by mandamus:

"When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this Court, either upon a new appeal or by writ of mandamus." *Baltimore & Ohio Railroad Co. et al v. United States et al*, 1929, 279 U.S. 781, citing *In re Potts*, 166 U.S. 263, 265, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, and cases cited.[18]

[18]The general rule is thus stated in 55 C.J.S. 171, Mandamus, § 100 d:

"Where a judgment, decree, or order of a superior court made in review of the decision of an inferior court comes down to the lower court, it is the duty of the lower court to enter and enforce it, and, if it fails or refuses to do so, mandamus ordinarily will lie to compel compliance therewith . . ."

American Jurisprudence states the rule similarly, 3 Am. Jur., 728, Appeal and Error, § 1232:

"When the trial court fails or refuses to obey or give effect to the mandate . . . of the reviewing court . . . it becomes the province and duty of the appellate court to enforce com-

The opposition, in its addendum, makes an interesting, but to me unconvincing, argument that this Court is empowered to fashion its own rules of procedure unsupported by any authority at all as far as I can discover. This, I think, may not be done. The effort is made to blaze an entirely new trail in the carefully guarded realm of criminal contempts. A surveyor attempting to establish a line in an unknown region must first find a monument, an established point of beginning. He must then find his bearings by two readings from the North Star. These requirements are a *sine qua non* of his ability to blaze a new trail. No court can, I think, invest itself with the right to take the liberties or the property of a citizen without a monument and bearings. There are none, as far as I can find, in the opposition's opinion.

We cannot lose sight of the fact that, under the heading "18 U.S.C.A. § 401, Power of Court," these words are found: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —." With these words of limitation begins the cautious marking of the area into which courts may enter in punishing alleged contempts. No statute and no decision invests them with the power sought to be used here, I respectfully suggest.

It seems to be accepted by all that the questions certified to the Supreme Court require answers granting these de-

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pliance therewith. The remedy generally recognized as the proper one is a writ or order of mandamus . . ."

To like effect are United States v. District Court, S.D. New York, 1948, 334 U. S. 258, 263, and Sibbald v. United States, 12 Peters 487, 491. The former of these cases is cited by the opposition as supporting its position. I think that this is a mistake and that it supports the views above expressed.

fendants the right of trial by jury, unless the order alleged to have been disobeyed was "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States . . . " The crucial importance of these words entitle them to a brief discussion in response to the opposition's supplementary comments.

The test to be applied is not who "brought" these contempt proceedings, nor who requested the restraining order of September 25th; the test is who "brought" the suit or action upon which the restraining order of September 25th is predicated. The civil action was brought and prosecuted by, and in the name of, and on behalf of James H. Meredith. This Court has characterized the Government's role in "entering" that action on September 18th thus; "These proceedings, therefore, are purely ancillary to the original lawsuit . . . " (Order of October 19th). The proceedings which produced the restraining order of September 25th were those constituting the civil action of James H. Meredith.

The cases which the opposition cites as the Government's authority to "enter" the action clearly refute the thesis that the Government's obtaining an order on September 25th (along with an almost identical order obtained by Meredith) destroyed defendants' right to a jury trial. In the *Bush* case, for example, the Government "entered" at the district court level and its status was explained and defined in these words: "The interest of the government here is the same as that which justifies its prosecution for obstruction of court orders in violation of 18 U.S.C. § 1509, or for contempt of those orders under 18 U.S.C. § 401." *Bush v. Orleans Parish School Board*, D.C. La., 1961, 191 F. Supp.

871, 877-878, affirmed 367 U.S. 908. This premature entry of the government into a pending civil action certainly adds nothing to its claim that defendants are not entitled to a jury trial. The status of the United States in this case is in no way different from its status as prosecutor in *any* criminal contempt case. That, on September 25, an order was entered at its request, as well as Meredith's, is, in my opinion, entirely immaterial.

If the position of the opposition be correct, then the executive branch of the government may be permitted to enter *any* civil case in which the government professes an interest, political or otherwise, and may be permitted to align itself with a litigant and obtain with him an order such as relied upon here. If such a proceeding would make a violation of that order the violation of an order "entered in [a] suit or action brought or prosecuted in the name of, or on behalf of, the United States," the statutory right to a jury trial would not depend upon the character of the relief sought in the action, the acts done, the statutes, or the real parties, but upon the whim of the Attorney General. I do not believe this to be the law. The government has an "interest" in seeing that all court orders are obeyed; this does not, however, give the government the right to make the decision whether a jury trial will be granted in a prosecution for an alleged violation of every order entered by every court in every civil case.

If the government's status in this case is such as to deny the defendants the statutory right to a trial by jury, it is my opinion that the provisions of 18 U.S.C.A. §§ 402 and 3691 are meaningless. To follow the government's and the opposition's argument is to hold that *every* civil case is one

brought or prosecuted in the name of, or on behalf of, the United States if some government official wants it to be and the court acquiesces in his desire. The right to jury trial does not, in my opinion, rest upon so frail a foundation.

The opposition misconstrues my remarks concerning the panel of Judges Brown, Wisdom and DeVane. I did not assert that it was not a duly constituted court, but that it was not an assembled court. My original opinion will show that it was my view that action to recall a mandate under the specific wording of the rule involved had to be done by a "court." What was attempted to be done on July 27-28 called for judicial action by the panel of three Judges. My original opinion asserted that those actions were not the product of an assembled court. The opposition's supplement does not challenge this statement.

My remarks about summer panels had to do with the attempted hearing and determination of important aspects of the Meredith case by panels of three Judges after the hearing of that case had been ordered by a majority of the Judges "before the Court in banc," and at the very moment when the Court in banc was engaged in consideration of the Meredith case and the entry of orders on other aspects of it. Jurisdiction of the Court is fixed by the express language of 28 U.S.C.A § 46(c) and, in my opinion, no informal understandings between members of the Court can invest any Judges with power to act except in conformity with law.

I took the position further that, if any action could be taken by any Judges except by the Court in banc, it would

have to be taken by the panel of Judges designated to act at that particular time. The records of this Court show that, on June 6, 1962, formal assignment of Judges for the summer panels was entered on the records, and that, e.g., the panel designated for the week of July 16, 1962 consisted of Judges Cameron, Brown and Wisdom. The records further show that this panel assembled in New Orleans on Thursday, July 19th, and heard extended oral argument in case No. 19730, *Guillory et al v. The Administrators of the Tulane University of Louisiana et al;* and that, upon consideration of the oral arguments and the briefs, it affirmed and remanded the case to the district court, upholding that court's denial of summary judgment and dissolution of a temporary injunction theretofore granted. 306 F. 2d 489 (July 21, 1962).

These defendants, subjected to criminal prosecution under serious charges, are in my opinion entitled to have the proceedings upon which the charges are based conducted in strict obedience to the Constitution and the laws.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,
Movant,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.
Respondents.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

Before TUTTLE, Chief Judge, and RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

JONES, Circuit Judge: It had been assumed by me that the purposes of a judicial opinion, unless it be in dissent, are to inform the losing litigant as to the reason why he has lost his case, and to set forth and publish the govern-

ing legal principles so that they might become precedents for future decisions. The use of judicial precedents and the application of the doctrine of stare decisis is a characteristic of Anglo-American law which distinguishes it from Roman law.[1] The use of precedents is older than the Year Books.[2] I cannot see how the judges of this Court are contributing to the law's development by writing opinions at this juncture of this cause where their equal division has called forth a certification of questions to the Supreme Court of the United States. We have not here made a decision. We have not here established a precedent. It was, and is, my view that we could, and should, submit our inquiry to the Supreme Court without indulging ourselves in an inconclusive debate of our divergent views upon the steps of the Supreme Court Building. Others of the Court are otherwise minded. Since opinions are being written, I will join the cavalcade lest there be a lurking suspicion that I am neglectful of a duty.

It seems to me that it is much less important, in the judicial scheme of things, that Governor Barnett[3] should escape being fined or jailed for his publicly demonstrated contempt of a valid order of this Court, of which he had notice, than that he should be denied the jury trial which he has demanded.[4] Blackstone, from whom a number of the founding fathers received their legal fundamentals,

[1]Llewellyn, The Common Law Tradition, Deciding Appeals, pp. 26 et seq; Radin, Anglo-American History, pp. 343 et seq; Salmond, Jurisprudence, 6th Ed., pp. 159 et seq.

[2]Holdsworth, The Year Books, 2 Select Essays in Anglo-American Legal History, pp. 110 et seq.

[3]And Lieutenant Governor Johnson.

[4]I do not adhere to the view that a grand jury indictment is required in order to impose punishment for criminal contempt. It is not the function of this Court to reconsider Green v. United States, 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672.

referred to trial by jury as "the grand bulwark" of the liberties of every Englishman, secured to him by the great charter.[5] Although it has been said, with little to support the saying, that the trial by jury was begun by Alfred the Great,[6] it was definitely incorporated into the law of England during the time for Henry II.[7] The opinion has been well expressed that "the most practical and effective safeguard of liberty and justice is the right of trial by jury," and it is "necessary for the defenders of that right to bear in mind that, 'Eternal vigilance is the price of liberty.' "[8] It has been said by Professor Dillon, "In criminal cases there is no substitute for the jury that would be acceptable to the profession or endured by the people. In the solemn act of passing upon the guilt of those charged with offenses against the public, the jury represents the majesty of the people as a whole . . . . "[9] It might not be amiss to look at the great instrument which was said to be "such a fellow that he will have no sovereign."[10] Thus it still reads after nearly three quarters of a millennium:

> "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we go upon him, nor send against him, save by lawful judgment of his peers, or by the law of the land." Magna Charta, Cap. XXIX.

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[5]Chase's Blackstone, 4th Ed., p. 1023.
[6]O'Donnell, Cavalcade of Justice, p. 63.
[7]Pollock & Maitland, History of English Law, Vol. I, pp. 73, 117 et seq.
[8]Dissenting opinion of Judge Rives in Mercer v. Theriot, 5th Cir. 1963, — F. 2d —.
[9]Dillon, Laws and Jurisprudence of England and America, p. 122.
[10]Edward Coke, speech in the House of Commons, May 27, 1628.

At the dedication of the Magna Charta Memorial at Runnymede in 1957, a former President of the American Bar Association, E. Smythe Bambrell, declared that the American Bill of Rights "still wears the crest of Runnymede."[11] Statutory constructions which deny to the citizen the fundamental and hallowed right of trial by jury should, wherever possible be avoided.

Criminal contempt is the willful violation of a duty created or declared by an order of court of such kind or degree that public interest permits it to be punished as a public wrong in a proceeding brought by the Government. Wharton's Criminal Law and Procedure § 1332. A crime is a wrong arising from a breach of a legal obligation which the Government deems injurious to the public at large and punishes through a proceeding in its own name. Bishop, Criminal Law § 32. Notwithstanding the substantial resemblance of criminal contempt and crimes, there are differences. There is a difference in the origin of the duties which, when breached, result in the commission of the offense. There is a difference in that there is a maximum penalty which may be imposed for the commission of a crime. Unless there is a statutory limit, the conscience of the court provides the only restraint upon the severity of the penalty for criminal contempt. There is a difference in that no person, except by his consent, shall be tried for a crime other than before a jury. In criminal contempt, in the Federal System, there is no right to a jury trial except as provided by statute. It has been said that criminal contempt is not a crime and it has been held that there is no right to a jury trial for criminal contempt under

[11]American Bar Association Meeting in London, p. 27.

the Federal Constitution as presently interpreted by *Green v. United States.* Note 4 supra. The Green case is discussed by Ronald Goldfarb in his article on The Constitution and Contempt of Court, 61 Mich. L. Rev. 283, Dec. 1962. But inherently, criminal contempt has most of the characteristics of a crime.[12] It is significant that statutory provisions which relate to contempt[13] are in the Criminal Code. Congress includes criminal contempt with "other criminal cases." 18 U.S.C.A. § 3691. The provisions of the rules[14] which relate to contempt are found in the Federal Rules of Criminal Procedure. Text discussions of criminal contempt are found in the treatises on criminal law.[15]

Contempt has been a subject of congressional consideration from the beginning. The earliest enactment was in 1789.[16] The next statute was passed in 1821 and it, with minor amendments, is on the books today.[17] The contempt provisions of the Norris-La Guardia Act[18] and of the Civil Rights Act of 1957[19] are pertinent here only as showing a congressional policy of favoring jury trials in contempt

[12]Cf. Gompers v. United States, 233 U. S. 604, 34 S. Ct. 693, 58 L. Ed. 1115; New Orleans v. New York Mail Steamship Co., 87 U. S. 387, 22 L. Ed. 354.

[13]18 U.S.C.A. § 401, 402, 3285, 3691 — 3693, 3771, 3772.

[14]Rules 17(g) and 42, Fed. Rules Crim. Proc., 18 U.S.C.A.

[15]See Wharton, Criminal Law and Procedure, § 1329 et seq.

[16]1 Stat. 92.

[17]A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. 18 U.S.C.A. § 401.

[18]18 U.S.C.A. § 3692.

[19]42 U.S.C.A. § 1971.

cases. Some procedural provisions are set forth in the Rules,[20] the application of which is hereafter discussed.

The Clayton Act, passed in 1914, contained provisions relating to punishment of contempts under some circumstances and providing for jury trials under some conditions. These statutes, as now incorporated in the Code, are as follows:

> "Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> "Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

[20]Rule 42, Fed. Rules Crim. Proc. 18 U.S.C.A.

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." 18 U.S.C.A. § 402.

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

"This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of, the United States." 18 U.S.C.A. § 3691.

The contempt of Governor Barnett[21] was the violation of an order entered in the suit of *Meredith v. Fair*. This was an action brought and prosecuted by Meredith, in the name of Meredith, and on behalf of Meredith. It was not brought or prosecuted by, or in the name of or on behalf of the United States. It seems to me that the strained and forced construction which reaches a different conclusion is wholly untenable. It is contempt to resist an order of court. 18 U.S.C.A. § 401. It is a crime to resist an officer in executing an order of court. 18 U.S.C.A. § 1501. See also 18 U.S.C.A. § 242. It seems clear that the acts and things done by Governor Barnett constituted not only a contempt but also a criminal offense. This being so, I would have no doubt but that, under Section 3691, there is a right to a jury trial unless the language of the statute precludes its application to the trial of criminal contempts of courts of appeals. This provision of the Clayton Act was not directly involved in the Green case although it is discussed in the dissenting opinion of Mr. Justice Black. The Shipp case[22] has been cited for the proposition that jury trials are not available to defendants in contempt cases. It seems to me that the obvious answer to this contention is that the Shipp case was decided before the Clayton Act was passed.

The District Court for the Southern District of Mississippi declined to enter an injunction requiring the admission of James H. Meredith as a student at the University of Mississippi. On June 25, 1962, this Court reversed,

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[21] There has been an adjudication of civil contempt upon the same facts as form the basis for the criminal contempt charge.

[22] United States v. Shipp, 203 U. S. 563, 27 S. Ct. 165, 51 L. Ed. 319; 214 U. S. 386, 29 S. Ct. 637, 53 L. Ed. 1041; 215 U. S. 580, 30 S. Ct. 397, 54 L. Ed. 337; 30 S. Ct. 403, 54 L. Ed. 1213.

directing that the injunction issue and that the district court retain jurisdiction.[23] For reasons which need not be here recounted, there was a delay in the compliance by the district court in the issuance of its injunction as directed by the order of this Court. This Court, concluding that time was of the "quintessence", withdrew its mandate and, on July 27, 1962, issued its injunctive order or judgment directing that Meredith be admitted to the University forthwith and prohibiting the University officials "and all persons having knowledge of the decree" from excluding Meredith from attending the University.[24] From this order there stemmed the restraining order which Barnett violated. Such violation is the genesis of the charge of contempt. Thus it is, that but for the fortuity of the delay of the district court in the entry of its injunctive order, the contempt proceeding now before this Court would be pending before or have been decided by the district court, in which, I conclude, it could not be plausibly asserted that a jury trial could be refused. The literal reading and strict construction of Section 3691 would permit a court of appeals, anticipating resistance to or noncompliance with a district court injunction, to issue its own injunctive order instead of issuing or requiring compliance with its mandate to a district court, and thus be in a position to conduct a criminal contempt trial without a jury. Although this was neither contemplated nor intended in the matter before us, the result is the same. I cannot attribute to Congress an intention that such a fundamental right as that of trial by jury shall be dependent upon either design or chance and happenstance.

[23]Meredith v. Fair, 305 F. 2d 343.
[24]Meredith v. Fair, 306 F. 2d 374.

We are told that this Court has neither statutory authority nor the facilities for empaneling a jury. The right may be implicit in the statute as well as express, and if a jury is allowed it is no answer to a demand for a jury to say that we have no jury wheel from which to draw, or that we do not now have a list from which to summon our veniremen. The right to a trial by jury, if authorized should not be denied because Congress has not blueprinted the specifications for getting the jury into the box. Apparently the Supreme Court of the United States has had no difficulty in the procurement of juries. In 1789 the Congress provided that the trial of issues of fact in cases before the Supreme Court in actions at law against citizens of the United States shall be by jury, 1 Stat. 80. The statute, with which changes in form, remains in effect. 28 U.S.C.A. § 1872. The first matter of consequence to come before the Supreme Court was *Georgia v. Brailsford*, 2 Dallas 402, 1 L. Ed. 433.[25] The case came before the Court again and was submitted to a jury after four days of argument. *Georgia v. Brailsford*, 3 Dallas 1, 1 L. Ed. 483. At least two other cases have been tried in the Supreme Court before juries. Carson, History of the Supreme Court, Vol. II, pp. 168-169, Warren, The Supreme Court in United States History, Vol. I, p. 104. The rules of the Supreme Court, adopted at the February Term, 1790,[26] make no reference to the manner of selecting a jury. The statute[27] says that the criminal contempt trial "shall conform as near as may be to the practice in other criminal cases." If this Court is unable to fashion the procedures for empaneling a jury, then its judges will

[25] Earlier procedural orders had been entered.
[26] 2 Dallas 399, 1 L. Ed. 432.
[27] 18 U.S.C.A. § 3691.

have lost that resourcefulness of which the record in this case so eloquently testifies.

We hear it urged that if Congress had intended for the provisions of Section 3691 to be applicable in courts of appeals it would have said so. The section refers only to district courts. I am not willing to assume that the Congress should have been expected to contemplate that an appellate court would be required to superimpose its jurisdiction upon that of a district court by invoking the All Writs Statute[28] to enter an exceptional and extraordinary injunction and buttress it with another injunctive order under the All Writs Statute.[29] I would construe Section 3691 as requiring a trial by jury in a court of appeals as well as in a district court, upon the demand of a defendant, where the act charged as criminal contempt also constitutes a criminal offense. I would give Barnett a jury trial.

No question has yet been raised by Governor Barnett as to whether the judges of this Court, or any of them, are disqualified, as a matter of law, to participate as triers of fact in a trial without a jury of this criminal contempt proceeding. Perhaps the conclusion has been reached that such a question is not now timely since it has not been decided that the cause shall be tried by the Court without a jury. Possibly it has been regarded that it would be inexpedient to raise the question. It may be that the

[28] 28 U.S.C.A. § 1651.

[29] There may be a valid doubt as to whether the order of this Court that Meredith be admitted to the University of Mississippi is valid. I assume its validity although believing it was an extraordinary exercise of a power which we are admonished to use only in exceptional cases. Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106.

question is immaterial to the matters presently posed for decision. Yet if the judges, or some one or more of them, are disqualified as triers of fact, or if there is reason to doubt their qualifications, might not such considerations cast some weight into the scales on the side of trial by jury?

I

On July 27, 1962, this Court ordered the enrollment of Meredith as a student at the University of Mississippi and directed its order to the University officials and all persons with knowledge. On September 12, 1962, the Governor issued his order to the University officials directing them to refuse the admission of Meredith. In a public proclamation on September 24, 1962, Governor Barnett recited "the direct usurpation of this [undelegated] power by the Federal Government through the illegal use of judicial decree" and directed the arrest of representatives of the Federal Government who sought to arrest any state official. On September 25th this Court entered its restraining order directed to Governor Barnett by name. On the same day Governor Barnett directed a proclamation to Meredith "finally" denying him admission to the University. These were before us at the hearing on civil contempt.

This Court, sitting en banc, conducted a trial of Ross R. Barnett for civil contempt on September 28, 1962. The acts and things with which he was then charged are the same as those with which he is now charged as constituting criminal contempt. After the trial, and on the day of the trial, findings of fact and conclusions of law were made and a judgment of civil contempt was entered. The Court found that "Ross R. Barnett deliberately prevented him

[James H. Meredith] from entering [the office of the Registrar of the University of Mississippi] and told him that his application for enrollment was denied by Ross R. Barnett." The Court found that, "The conduct of Ross R. Barnett in preventing James H. Meredith from enrolling as a student in the University of Mississippi has been with the deliberate and announced purpose of preventing compliance with the orders of this and other Federal Courts." As a conclusion of law this Court held that "Ross R. Barnett is in contempt of the temporary restraining order entered by this Court on September 25, 1962." Thereafter the Attorney General was requested by the Court to bring a criminal contempt charge.

There is a present unwillingness on my part to express the opinion that the defiant statements made by Governor Barnett, or any other of the matters involved in the civil contempt proceedings, are such as would disqualify the judges of this Court under Rule 42(b).[30] Such contention might be urged with plausibility. Cf *Offutt v. United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11.

Of greater moment, it would appear, is the question as to whether a trial for criminal contempt by the judges who conducted the trial, made the findings, and entered the judgment in the civil contempt proceeding and then initiated criminal contempt proceedings, could be, and appear to be, such a fair and impartial trial, as a matter of law, as would meet due process requirements. Not squarely in point on its facts, but pertinent and, I think,

[30] If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Rule 42(b), Fed. Rules Crim. Proc. 18 U.S.C.A.

controlling, as to the principles announced, is In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942. From the opinion in Murchison it appears that the Michigan law permits every judge of a court of record to act as a one-man grand jury. A judge so acting charged two witnesses with contempt; one of them, White, for refusing to answer questions, and the other, Murchison, for perjury. After notice the judge tried White and Murchison in open court, found them guilty and imposed penalties. The Supreme Court held that due process had been denied. In the opinion of Mr. Justice Black, speaking for a six-justice majority, it is said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the

best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14.

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an original lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. See Cooke v. United States, 267 U. S. 517, 539. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here. For we held in the Oliver case that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.

"As a practical matter it is difficult if not impossible for a judge to free himself from the in-

> fluence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." 349 U. S. 133, 136–138.

A grand jury, whether one man or many men, finds probable cause to believe that a crime may have been committed. The Court has not only performed the grand jury function of causing the charge of criminal contempt to be preferred; it has done more, it has found in the civil contempt cause that Barnett is guilty of the acts with which he is charged in the criminal contempt proceeding.

If the evidence on the criminal contempt trial is the same, or substantially so, as that which was before the Court in the civil contempt case, can the judges be expected to erase the inferences and conclusions which that evidence produced when it was previously considered? Will the judges be able to make any nice distinction between preponderance of the evidence, which I suppose was the standard in civil contempt, and proof beyond a reasonable doubt, which, presumably, would be required to convict of criminal contempt? If the evidence on the criminal contempt charge is substantially different than that which was before submitted, will the judges be able to expunge from mind and memory that which they heard and saw at the former trial? And how would they know? And would it appear so? I need none to bear me witness that the judges of this Court have no actual bias in this cause. I need none to assure me that the judges of this Court would "do their very best to weigh the scales of justice equally between contending parties." I do not suggest prejudice

or disqualification as a matter of fact. I make inquiry as to whether there is disqualification as a matter of law.

The defendants have not suggested disqualification. But should the Court wait for the defendants to raise the question? If there is a doubt as to the qualification of the judges, should it be ignored if the defendants do not raise it? If the judges, or any of them, are disqualified as triers of the fact, ought not the Court say so?

This digression on disqualification has been overlong. My views are that Governor Barnett is entitled to a trial by jury; but if judges are to be triers of the facts, any question as to the qualifications of the judges of the Court should be considered and determined.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.
Defendants.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

Before TUTTLE, Chief Judge, and RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN, and BELL, Circuit Judges.

GEWIN, Circuit Judge: In the beginning the plaintiff Meredith brought a civil action against the defendant Fair, as President of the Board of Trustees of State Institutions of Higher Learning, and others, to enforce constitutional rights allegedly denied to the plaintiff Meredith. Before this court was convened for an en banc hearing, a panel of the court by a 2 to 1 decision granted to Meredith all

the relief he sought.[1] Neither Meredith nor his counsel now appear in court. The case has changed its identity. Its style is now United States of America v. Ross R. Barnett and Paul B. Johnson, Jr., who are Governor and Lieutenant Governor respectively of the State of Mississippi. At this stage of the proceeding, Meredith, the individual who commenced the proceedings, has no part in the procedure under consideration. The defendants who are now before us, charged with criminal contempt, were not parties in the lower court. They were joined after the case had reached us, a decision rendered and our mandate issued, amended and returned to the District Court where the case originated. Accordingly, since the original suit was filed, the original plaintiff has faded out of the picture. The original defendants are no longer before us. Now, the United States claiming to be "something more than *amicus*" is the plaintiff-prosecutor. This metamorphic transformation took place in this court on the appellate level. No action of the District Court in Mississippi is before us for review.

The device used to accomplish this transformation is an order of a panel of this court dated September 18, 1962, designating the United States as *amicus curiae* — "a friend of the court." The mentioned *amicus* order and the actions of the United States pursuant to it, are the sources of my initial difficulty with the entire proceeding.

In a criminal case neither the prosecutor nor the defendant should be a friend of the court in which the case is to be tried. All litigation, especially criminal prosecu-

[1]298 F. 2d 696; 305 F. 2d 341; 305 F. 2d 343; 306 F. 2d 374.

tions, should be conducted in an atmosphere of independent, fearless impartiality. The court should have no friends and no enemies amongst the litigants.

The sine qua non of all litigation is the adversary system in which adverse parties represent and assert adverse interests in a completely neutral atmosphere, where only the law and strict rules of justice can gain the attention of the court.[2] Any less standard does not serve the purpose of preserving and maintaining the due administration of justice and the integrity of the judicial processes of the courts. Intimacy and cooperation between the court and one of the parties before it, or counsel for one of the parties, will destroy the due administration of justice, the integrity of the judicial processes and will reduce the court to a mere gewgaw.[3]

In my view, a true *amicus* is a non-partisan adviser of the court who gives information to the court on some matter of the law with respect to which the court may be doubtful; or who may assist the court in the enforcement of judgments and decrees already made; but an *amicus* is not and should not be a party to the suit, should not have control over it, but should accept the case before the court with

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[2] "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies.' A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure." Muskrat v. United States, 55 L. Ed. 246.

[3] Nothing herein said should be construed as an unfavorable reflection on the Attorney General or the Justice Department or counsel appearing on behalf of the United States. After all, a panel of this court appointed them and requested them to act. They are advocates and they are only acting as advocates in this proceeding.

the issues made by the parties involved. An *amicus* who has demonstrated an active interest in civil litigation and has actually participated in such litigation on the side of one of the parties should never be appointed to prosecute a criminal case arising out of the same litigation; and while serving as *amicus*, undertake to help the court reach a conclusion as to the guilt of the defendant.

In this case, the United States acting as a friend of the court is framing issues and making charges of criminal conduct and proposes to pursue the prosecution of the defendants to the ultimate conclusion of the case. The cases of *Bush* and *Faubus*[4] are not authority for the action of the *amicus* in the instant case. In each of the cited cases the *amicus* was appointed in the District Court where the case originated and was pending; no contempt proceeding was involved; and no one was charged with the commission of a crime. There are other distinctions, but those mentioned will suffice. The United States has heretofore assisted the private litigant Meredith. This court judicially knows that counsel for the United States actively participated in certain aspects of the civil proceeding and the evidence adduced before us on the civil contempt hearing clearly showed the activity of counsel for the United States on behalf of the plaintiff Meredith in the civil suit. Indeed, in the application seeking designation as *amicus* the following allegation is made:

[4]Bush, et al. v. Orleans Parish School Board, et al., 190 F. Supp. 861 (E.D. La. 1960), aff'd sub. nom; Bush, et al. v. Orleans Parish School Board, et al., 191 F. Supp. 871 (E.D. La. 1961) aff'd. 368 U. S. 11, 7 L. Ed. 2d 75. Faubus, et al. v. U. S. of America, et al., 254 F. 2d 797 (8 Cir., 1958) cert. den. 358 U. S. 829, 3 L. Ed. 2d 68.

> "The United States has an interest in the orderly administration of its judicial processes and in the due observance and implementation of the orders and mandates of this Court. *This interest cannot be adequately represented by the plaintiff in this proceeding.*" (Emphasis added)

After the United States was designated *amicus*, their participation in the civil proceeding was extensive. Counsel for the United States and for the plaintiff Meredith sat at the same counsel table and conferred; both participated in the filing of pleadings and although pleadings were separate, they were substantially identical. Both participated on the same side at the civil contempt hearing and substantially the same evidence was offered by each in the hearing with reference to civil contempt. Those actions may have been appropriate in a civil proceeding, but now we are concerned with a criminal case. In the order of this court directing " . . . the Attorney General of the United States and such attorneys in the Department of Justice as he may designate . . . to institute and prosecute criminal contempt proceedings against the said Ross R. Barnett and Paul B. Johnson, Jr. . . . ", the following appears in the preamble to the order:

> "It appearing that the United States as amicus curiae filed in this Court on November 6, 1962, a memorandum suggesting that the taking of further evidence concerning the actions of Ross R. Barnett would be appropriate with respect to the

issue of whether Ross R. Barnett has purged himself of his civil contempt of this court;"[8]

The standing and duties of an *amicus* have been well defined in the law. Mr. Justice Frankfurter stated in *Universal Oil Products Co. v. Root Refining Co.*, (1946), 328 U.S. 575, 90 L. Ed. 1447:

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[8]My opposition to the order directing the institution of criminal proceedings was evidenced by my dissent when the order was issued on November 15, 1962.

The full text of the order authorizing the criminal prosecution is as follows:

"It appearing that this Court, on September 18, 1962, designated the United States as *amicus curiae*, with the right to submit pleadings, evidence, arguments and briefs, and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States, and (emphasis added)

It appearing that the United States as *amicus curiae* filed in this Court on November 6, 1962, a memorandum suggesting that the taking of further evidence concerning the actions of Ross R. Barnett would be appropriate with respect to the issue of whether Ross R. Barnett has purged himself of his civil contempt of this Court; and (emphasis added)

It appearing from the pleadings filed and the oral testimony and documentary evidence already adduced in the proceedings on the petitions for temporary restraining order and for preliminary injunction and the civil contempt proceedings heretofore instituted against Ross R. Barnett and Paul B. Johnson, Jr., that proceedings should be instituted against the said Ross R. Barnett and Paul B. Johnson, Jr., to determine whether they are, or either of them is, guilty of criminal contempt of the orders of this Court; and

It appearing undesirable to conduct successive proceedings involving similar factual issues and that litigation of such issues in a criminal contempt proceeding would afford to the said Ross R. Barnett and Paul B. Johnson, Jr., maximum procedural protection;

IT IS ORDERED that the Attorney General of the United States, and such attorneys in the Department of Justice as he may designate, be and they are hereby appointed by the Court to institute and to prosecute criminal contempt proceedings against the said Ross R. Barnett and Paul B. Johnson, Jr., pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of this Court of September 13, 1962.

This 15th day of November, 1962."

"Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome,"

While it is true that Federal Courts are always at liberty to call on officers of the United States to serve as amici, such officers are disqualified, in my judgment, when they have taken an active role in the litigation "in the service of those having private interests in the outcome."[6]

[6]Such has been the uniform holding of other authorities as to the duties and rights of an *amicus*.

"A by-stander (usually a counsellor) who interposes and volunteers information on some matter of law in regard to which the judge is doubtful or mistaken." Black's Law Dictionary (4th Ed., 1951) p. 107

"In view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question raised only in a brief filed by an amicus curiae, by leave of court, will not be considered." 3 C.J.S. § 3, p. 1059

"An amicus curiae is heard only for the purpose of assisting the court in a case already before it, and the function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration."

"An amicus curiae is not a party and cannot assume the functions of a party, an attorney for a party or even a partisan. He has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties." Am. Jur. 2d, Vol. 4 § 3, pp. 110-11

"Furthermore, in a quasi criminal prosecution for a violation of a municipal ordinance, it has been held that amicus curiae briefs should not be received and considered over the objection of both the prosecution and the defendant, where such briefs tend to impress upon the court the guilt of the defendant." ibid § 4, p. 113

"It has been held that an amicus curiae is one who gives information to the court on some matter of law in respect to which the court is doubtful, or upon a matter of which the court may take judicial cognizance; that he is not a party to the suit, has no control over it, and must accept the case before the court with the issues made by the parties." United States v. F.M. Jabara & Bros., 19 U. S. Ct. of Customs & Pat. Apps. 76

"An amicus curiae is 'not a party to the action, but is merely a friend of the court whose sole function is to advise or make suggestions to the court'." Clark v. Sandusky, 7 Cir., 1953, 205 F. 2d 915, 917

See also Northern Securities Co. v. United States, 48 L. Ed. 299;

The next difficulty I encounter with the case is a procedural one. My four brothers who have the view that this court should proceed with the trial of the defendants seem to feel no such pause or restraint, and they resolve all doubts with respect to the *amicus* order of September 18, 1962, with the simple statement that the order " . . . constituted the United States as something more than a mere amicus curiae." In my view, the position of the United States in this proceeding is cloaked with obscurity and uncertainty, *but it is acting like a party.* There has been no effort to intervene in the lower court. There is a definite distinction between a party and an *amicus.*[7] No effort has been made to comply with the decisions and rules relating to intervention. See F.R. Civ. P. 24(c) and 6(d); *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*, D. Del. 1922, 280 Fed. 934; Moore, Fed. Pract. 2d ed. Vol. 4, p. 95.

If the United States is to act as a party in the case, it should seek intervention in accordance with the accepted procedural rules which are fundamental to the law. Following the majority rule, this Circuit has been slow to permit intervention on the appellate level even when formal application was made. "Intervention in an appellate court is certainly unusual.", 5 Cir., 1939, *Morin v. City of Stuart,*

Faubus v. United States, 254 F. 2d 797, 805 quoting from the Universal Oil Products case; 2 Modern Fed. Practice Digest, Amicus Curiae p. 660; 3 Words & Phrases, perm. ed., Amicus Curiae p. 478.

[7] "Where a statute gives an absolute right to be heard, which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal. Subject to this proposition, an intervenor must be sharply distinguished from a mere *amicus curiae* or a person who has been heard but has never intervened." Moore's Fed. Pract., Vol. 4, 2d Ed. p. 104

112 F. 2d 585; "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." (citing the Morin case), *McKenna v. Pan American Petroleum Corp.*, 5 Cir., 1962, 303 F. 2d 778; see also *Holland v. Board of Public Instruction of Palm Beach*, 5 Cir., 1958, 258 F. 2d 730, 738. If intervention was desired, application should have been made in accordance with the rules in the Federal District Court where the action was pending. 4 Moore Fed. Pract., 2d Ed. p. 96; 39 Am. Jur. §73 p. 945; *Stallings v. Conn*, 5 Cir., 1934, 74 F. 2d 189.

Through the device of designating the United States as *amicus*, the effort here is to make the United States the prosecuting party-plaintiff, and the defendants Barnett and Johnson, the accused parties-defendant, but no effort has been made to comply with any procedural rules. As a matter of fact, the District Court has been ignored. No action of the District Court in this connection has reached us for review. Since the mandate issued by a panel of this court on July 28, 1962, amending the mandate of the same panel issued on July 27, 1962, which directed the District Court in Mississippi to do certain things, but also attempting to reserve jurisdiction in this court, we have not considered the trial court where the lawsuit originated. We have acted as a trial court.

Under the direction and supervision of this court in the criminal contempt case now pending, the Government as *amicus* (or "something more") has filed pleadings, briefs, presented arguments, participated in hearings as to procedure, filed charges against the defendants in the form of a show cause order, and generally conducted itself as

an original party. In some respects a record has been maintained of the actions of the trial court and our review thereof, but not in every instance. As a matter of fact, the *amicus* order of September 18, 1962, signed by a panel of this court, was presented to the Judge of the United States District Court in Mississippi. When the District Judge orally made some suggestion as to a change in the order, the United States abandoned that court and presented its request to this one. Only a telephone communication between one or two Judges of this court and the District Court constitutes the record in this regard. All of the foregoing has resulted in the creation of an original criminal case on the appellate level styled the United States of America v. Ross R. Barnett and Paul B. Johnson, Jr. The prosecuting plaintiff has never been before the trial court, the defendants have never been brought to the trial court, no pleadings were filed there, there is no evidence or record to examine, and no decision of the trial to review.

If the foregoing considerations are deemed to be picayune, they may be brushed aside and speedy results can be accomplished, but such a course of procedure does not comport with our traditional concepts of justice and the seriousness of placing individuals in jeopardy of their liberty by short cut and speedy methods. If the procedure outlined is approved, a new field of jurisprudence will have been created in my humble opinion. Throughout the case there appears to have been a deadline against which all substantive rights, procedure, and other considerations must willingly yield.

In the opinion of this court dated July 27, 1962, vacating stay, recalling mandate, and issuing new mandate forth-

with, it is stated, "*In this case time is now of the quintessence.*" (emphasis added) It is easy to yield to the criticism sometimes heard that judicial processes in a democracy are too slow. The truth is that all processes in a democracy are slow compared with the speed with which results are accomplished under some other types of government — the judicial process alone is not involved. Rules of law may serve to protect the rights of individuals in the courtroom as well as in the policeman's office. If expediency is to be the guiding rule in this case, some kind of a decision resulting in a judgment of guilty or not guilty can be rendered at an early date, but I cannot follow such rules of expediency unless such course of conduct is declared to be the law of the land. In my view, there is no end which justifies such means. With all our rush, turbulence, deadlines, speed and excessive zeal, we should remember substantive and procedural fundamentals. In this case, as in many others, procedure protects substantive rights. This case involves the criminal prosecution of the Governor and the Lieutenant Governor of a State of this Nation. Regardless of the parties involved, constitutional and statutory guarantees as they relate to liberty are seriously involved. Conviction of the crimes charged may subject two human beings to serious criminal penalties and interfere wtih the governmental functions of a State of this Union.

Although not presently and eminently involved, it should be noted that the acts now charged as criminal acts are substantially the same ones as were involved in the civil contempt; although the civil contempt charges were not as formal. The defendant Barnett was adjudged guilty of civil contempt by this court. After proper notice, opportunity to be present and after a hearing at which evidence

was received, pertinent facts were developed with reference to the civil contempt charge, the right to cross-examine and the right to exercise all of the traditional rights which accompany such court procedure, this court unanimously concluded that the defendant Barnett was guilty of civil contempt.[6] He was instructed to remove himself from the pathway which blocked the plaintiff's entry to the University of Mississippi; and he was told what would happen to him if he did not. Neither the defendant Barnett nor the defendant Johnson have further interfered. On October 2, they appeared before a panel of this court through counsel and assured the court that full compliance with the court's orders would be achieved so far as they were concerned. Because the court had acted en banc with reference to the civil contempt charge, it was considered appropriate for the court to decide en banc whether the defendants had purged themselves of civil contempt, all as agreed in open court by defendants through their counsel and a panel of this court which heard the report on October 2. The hearing before the court en banc was set down for October 12, 1962. At that time, the same counsel appeared for the same defendants; one of which counsel reaffirmed the position taken on October 2, but the other undertook to reserve for Governor Barnett an area of discretion as to future compliance. Thereafter, this court issued a full and complete preliminary injunction, far more explicit and detailed than the original restraining order which the defendants had been charged with violating. Most of the acts now charged in the criminal proceeding relate to conduct alleged to have

[6] Lieutenant Governor Johnson was also found guilty of civil contempt by a panel of this court.

taken place before our adjudication of guilt in the civil contempt. To date the court has imposed no sanctions pursuant to its order of civil contempt.[9] There has been a

[9]The attitude of the *amicus* and the participation of the *amicus* in the civil contempt proceeding are evidenced by the following from the transcript of proceedings in the civil contempt case:

"JUDGE TUTTLE: Mr. Marshall, in the light of this present situation, what do you recommend?

"MR. MARSHALL: May it please the Court, this is clearly a very serious situation for the United States. I would like to start out by saying that I find it very difficult to believe that a state which is defending the rights of the state is at the same time apparently denying a responsibility to exercise the basic right of the states to maintain law and order within their borders, if that is the position of the attorneys representing the State.

"Now it is a fact, I think, that Governor Barnett has taken steps to purge himself of the contempt in which this Court found him. The Governor did during the few days preceding the finding of contempt interfere directly and physically with the carrying out of the Court's order by preventing Mr. Meredith from entering on the campus and becoming registered. He has taken steps, I think, to purge himself of that contempt of Court. Whatever his lawyers say in this court today, he did in fact instruct the law enforcement officers of the State to cooperate with the Federal law enforcement officers in bringing Mr. Meredith on the campus a week ago Sunday and physically permitting him to enter the campus and to register there as a student. To that degree, Governor Barnett has certainly brought himself in compliance with the Court.

"The order of the Court which he was required to meet also required him to notify all law enforcement officers of the State of Mississippi that they should cooperate with the officers and agents of the Court and of the United States to the end that James Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students. I think that the showing of purging on that aspect of the Court's order is not sufficient. The Governor has now (sic) shown what instructions, if any, he gave to the law enforcement officers of the State, and as far as the record is concerned, and as far as the Government's personal knowledge is concerned, I do not know what instructions he gave to the law enforcement officers of the State.

"This is still a civil contempt proceeding, it is still a remedial proceeding. Any questions of punishment for past actions are properly the subject of criminal contempt action. The fact is that at the moment law and order is maintained in the City of Oxford and on the campus of the University of Mississippi by Federal officials, Federal officers. I do not know of any specific action that this Court can ask the Governor to

suggestion in one of the briefs filed by the Government that perhaps further facts should be developed in the civil contempt proceeding. Without any further attention to civil contempt, the case has now been converted to criminal contempt.

The foregoing considerations bring us to another serious aspect of the case — the question of the right to trial by jury. The defendants have filed appropriate pleadings and motions which bring to the attention of the court the various problems presented, including the right to a jury trial. It seems unnecessary to rule on specific motions attacking various segments of the procedure involved until the chief questions which trouble the court have been settled. The division in our court makes it imperative that the questions presented be certified to the Supreme Court of the United States.

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take within the next few days or at any particular time, because I do not know when it will appear to be possible for the Federal Government to withdraw force in sufficient numbers so that the responsibility resumes in the State to maintain law and order on that campus and in that city, but I think that the Court should look — I think that the Court cannot on the present record and on the statement of Counsel find that the Governor has purged himself of contempt.

"I think that the Court should look again to the future, because I think that he has purged himself enough to show that the sanctions set by the Court do not necessarily have to be imposed now. I think that the future to which the Court should look is the time when the Federal Government feels that it is safe and that they have met their responsibilities and that conditions are stable enough so that the basic Federal force protecting Mr. Meredith and maintaining law and order can be withdrawn. I think at that time it will be the performance of the Governor which is significant. I think at this time the assurances given to the Court by the Governor are unsatisfactory and that the Court may wish to take steps to make sure that they become satisfactory.

"I think that is the best that I can suggest, Judge Tuttle, considering that this is a change of position by the State, which I did not expect."

Directly involved are certain statutes relating to the power of courts in criminal contempt cases and the right to trial by jury. Title 18 §§ 401, 402 and 3691. The matter of the right of trial by jury in a criminal contempt proceeding has been the subject of much discussion in the courts and among legal scholars. The most recent expression by the United States Supreme Court is the case of *Green v. United States*, 358 S. Ct. 632, 356 U.S. 165, 2 L. Ed. 2d 672. In the majority and dissenting opinions one will find a thorough review of the subject. To say the least, the common law as it existed before the adoption of our Constitution " . . . is shrouded in much obscurity." Much of the argument begins at this point. For our purposes it seems sufficient to say that the Green case is easily distinguishable from the case at hand for two reasons: (1) In the Green case the United States commenced the proceeding in the District Court and was a party from the beginning; (2) The act which constituted the contempt in the Green case (bail jumping) was not a federal criminal offense at that time. In the Green case the position of the United States was clear from beginning to end — it was a party to the litigation. As heretofore stated the United States did not enter the instant case until the litigation had been decided in the appellate court and returned to the District Court by proper mandate, although the last mandate also sought to retain jurisdiction in this court.

It is obvious that the acts with which the defendants Barnett and Johnson are now charged, constitute crimes under Title 18 USCA § 242 and § 1509. Under Title 18 §§401, 402 and 3691, it is clear that the defendants would be entitled to a jury trial if they were being prosecuted in the United States District Court, unless the alleged dis-

obedience of the writs, processes and orders of the court were involved in a "suit or action brought or prosecuted in the name of, or on behalf of, the United States." In my opinion, the United States is not a party and therefore the exemption of the statutes would not apply for that reason. It should be remembered also that the United States District Court, pursuant to the final mandate of this court, issued its permanent injunction placing substantially the same restraints on the defendants as the temporary restraining order of this court. Whatever acts violate the orders of this court may reasonably be said to constitute a violation of the orders of the United States District Court.[10] Accordingly, if the United States is not a party

[10]The order of the District Court for the Southern District of Mississippi granting the permanent injunction dated September 13, 1962, was broad and general and complied with every Mandate issued by this Court, and the Mandate of Mr. Justice Black of September 10, 1962. While the defendants, Barnett and Johnson, are not specifically mentioned therein, numerous persons are mentioned and the order applies to ". . . all persons in active concert and participation with them be and they hereby are permanently restrained and enjoined from . . . ."

The temporary restraining order issued by a panel of this Court dated September 25, 1962, refers to the order of this Court dated July 28, 1962, and the fact that the District Court for the Southern District of Mississippi ". . . having entered a similar order on September 13, 1962, pursuant to the Mandate of this Court . . . "; and said order of this Court temporarily restrained the defendants (and other persons) from:

"4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

"5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard

and if the acts charged in the show cause order also constitute a violation of the orders of the United States District Court and constitute federal criminal offenses, the defendants are entitled to a trial by jury if tried in the District Court. To me it is perfectly logical therefore to hold that if the defendants Barnett and Johnson are given greater substantive and procedural rights in the District Court than in our court (assuming such rights to be greater in the District Court than here) they are entitled to demand and receive a trial in that court which will guarantee the full rights assured to them by statute. The device of designating an *amicus* and giving the *amicus* the right in effect to choose the court to hear the case is improper. The choice of forum to the extent indicated should not be tolerated in criminal cases.

To say the least, there is serious disagreement and debate amongst the scholars and those in ultimate authority as to the right of trial by jury in criminal contempt cases. Regardless of the final conclusion reached in that controversy, it is enough to say that *under the facts and in the circumstances of the instant case* outlined herein, the question of guilt or innocence should be decided by a jury. In my judgment, the proper place to try the defendants is in the United States District Court where the case originated; but if not, a jury should be provided in our court. Trial by jury in appellate courts is not completely unknown to the law. Title 28 USCA § 1872 provides:

"§ 1872. Issues of fact in Supreme Court. In all orig-

Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty."

inal actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury. June 25, 1948, c. 646, 62 Stat. 953."[11]

For the reasons stated, it is my opinion that this case should not be tried in the appellate court with the United States designated as *amicus*, serving as party and prosecutor, but the case should be certified to the United States District Court where the case originated, for trial there. In any event, whether the trial is in the United States District Court or in our court, the defendants should be accorded a trial by jury.

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[11]See also the State of Georgia v. Brailsford, (1794), 3 Dall. 1, 1 L. Ed. 483.

The following statement from Hart and Wechsler, "The Federal Courts and The Federal System", is of interest:

"Since the earliest days, original cases have usually been equitable in character, and invariably the Court has been able to deal with problems of taking testimony and preparing findings of fact by the procedure of reference to a special master. The Seventh Amendment, however, applies to trials at common law in the Court, as 28 U.S.C. § 1872 recognizes, although no trial by jury seems to have been held since the eighteenth century. See Georgia v. Brailsford, 3 Dall. 1 (U.S. 1794)."

"See also 1 Carson, History of the Supreme Court of the United States 169, N. 1 (1902), describing two other unreported instances of trial by jury, in 1795 and 1797. Cf. United States v. Louisiana, 339 U. S. 699, 706 (1950), denying Louisiana's motion for a jury trial."

Footnote 1 referred to above in Carson's History of the Supreme Court, page 169, contains the following comment:

"3 Dallas 1, (1794). It has been asserted that this case is the only instance of trial by jury in the Supreme Court. This is an error. The minutes of the court disclose that in the case of Oswald v. The State of New York, a jury was sworn and witnesses called, and a verdict found for the plaintiff of $5,315.06. This was in February, 1795. Two years and a half later a writ of inquiry of damages in the case of Catlin v. The State of South Carolina, was executed at the bar of the Supreme Court, and a verdict was given for the plaintiff for $55,002.84 . . ."

I fully approve and concur in the additional statement of Judge Bell set forth under Section VII of his opinion; and wholeheartedly join in his expressions as to the dissent therein mentioned, and certification of the additional question therein set forth. I do this rather than to add to my own opinion.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,
Movant,

versus

GOVERNOR ROSS R. BARNETT and
LIEUTENANT GOVERNOR PAUL B. JOHNSON, JR.
Respondents.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

Before TUTTLE, Chief Judge, and RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

BELL, Circuit Judge:

I.

Prior to becoming President, Abraham Lincoln, when told with reference to slavery that the law was wrong in

taking a man's liberty without trial by jury, responded that slavery was ungodly,

> "But it is the law of the land, and we must obey it as we find it."[1]

New legal precedents of recent years, with resultant changes in the existing order, have brought this maxim of another day, expressing an American tradition, into sharp focus. The necessary accommodation has differed in degree and manner; running the scale from prompt compliance, on through a middle ground of painful but responsible and dignified adjustment, down to extreme recalcitrance or outright refusal even to obey court orders entered, as they must be, pursuant to these precedents.

This case is concerned with what started as outright refusal on the part of Respondents herein, the Governor and Lieutenant Governor of Mississippi, to obey or let others obey court orders. Having been cited to show cause why they should not be held in criminal contempt for wilfully disobeying the temporary restraining order entered by this court on September 25, 1962 in the matter of *United States v. State of Mississippi, et al.*, No. 19,475, a proceeding ancillary to that of *Meredith v. Fair*, No. 19,475, their several motions to dismiss including that based on lack of grand jury presentment and indictment are denied under separate orders. Their demand for trial by jury in the district where the alleged contemptuous acts or omissions were committed or omitted is the subject matter of this further discussion.

[1]Sandburg, Abraham Lincoln, The Prairie Years, Volume II, p. 236.

The background of the show cause order is the case of *Meredith v. Fair*, supra, and the incidental and ancillary proceedings arising therefrom. That suit involved the constitutional right of the plaintiff, James H. Meredith to attend the University of Mississippi free of discrimination because of race. The right to jury trial claimed here springs somewhat vicariously from the grant of that right. And having accorded plaintiff there his right, we must be alert not to now deprive Respondents of their right.

This court reversed the judgment of the District Court for the Southern District of Mississippi with the result that Meredith was to be admitted as a student to the University of Mississippi. The final order, dated July 28, 1962, of this court was unprecedented, in that jurisdiction was reserved full force to this court while at the same time the case was returned to the jurisdiction of the District Court from whence it came. Pursuant to mandate, the terms of the order were made the judgment of the District Court on September 13, 1962. The order of this court in pertinent part is as follows:

> "This Court on July 26, 1962 entered its opinion and judgment forthwith (1) vacating a stay issued herein by Judge Ben F. Cameron, July 18, 1962, (2) recalling its mandate issued herein July 17, 1962, (3) amending and reissuing its mandate, for the purpose of preventing an injustice, by ordering the District Court to issue forthwith an injunction against the defendants-appellees ordering the immediate admission of the plaintiff-appellant, James H. Meredith, to the University of Mississippi, (4) which opinion and judgment includes an order of

injunction by this Court against the defendants-appellees herein.

"Now, therefore, the following injunctive order is issued:

"ORDER

"Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University, the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree are expressly:

"(1) Ordered to admit the plaintiff, James H. Meredith, to the University of Mississippi, on the same basis as other students at the University, under his applications heretofore filed, which are declared to be continuing applications, such admission to be immediate or, because of the second summer session having started, such admission to be in September, at Meredith's option, and without further registration.

"(2) Prohibited from any act of discrimination

relating to Meredith's admission and continued attendance, and is

"(3) Ordered promptly to evaluate and approve Meredith's credits without discrimination and on a reasonable basis in keeping with the standards applicable to transfers to the University of Mississippi."

Thus the same order was of force in each court, not only during admission but during continued attendance. This situation, whether fortuitous or otherwise, has been construed as giving those who sought to enforce the orders, plaintiff Meredith with the help of the Department of Justice, a choice of courts from which to seek ancillary relief. Traditional procedures including any distinction between original jurisdiction in the District Court and appellate jurisdiction in this court have been largely disregarded. Some orders were in fact sought from and granted by each court. Of these, at least two were granted by this court after refusal by the District Court. One of these was the order of this court of September 18, 1962 designating the United States as *amicus curiae*.

The orders material to this proceeding, other than the original order of July 28, 1962 reserving jurisdiction in this court during "continued attendance", are the order designating the United States to appear and participate as *amicus curiae* in all proceedings in the case of *Meredith v. Fair*, in this court and in the District Court, and the temporary restraining order of September 25, 1962 which Respondents are charged with violating. The *amicus* order authorized the United States to submit pleadings, evidence,

arguments, and briefs and to initiate such further proceedings, including proceedings for injunctive relief and for contempt of court as might be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States.

Thereafter this court entered the temporary restraining order of September 25, 1962 at the request of *amicus curiae* and plaintiff in *Meredith v. Fair*, restraining the State of Mississippi and its Governor, Ross R. Barnett, their agents, employees, officers and successors, together with all persons in active concert or participation with them, from interfering with or obstructing by any means or in any manner the enjoyment of rights or the performance of obligations under the order of July 28, 1962 of this court and the order of September 13, 1962 of the District Court, both of which orders required the enrollment of James H. Meredith in the University of Mississippi. No application for a restraining order was made to the District Court. The application in this court was original.

The order to show cause charges that after service, and on September 25, 1962, Governor Barnett wilfully prevented Meredith from entering the office of the Board of Trustees of the University in Jackson, Mississippi where he was to be registered as a student pursuant to the order of the court. On September 26, 1962 Lieutenant Governor Johnson, acting as officer and agent for Governor Barnett and for the State of Mississippi is alleged to have prevented Meredith from entering the campus of the University of Mississippi at Oxford, Mississippi and from enrolling as a student at a time when Lieutenant Governor Johnson had

notice of the temporary restraining order. The Governor and Lieutenant Governor are alleged to have assumed responsibility on September 27, 1962 for maintaining law and order on the campus of the University in connection with the expected enrollment of Meredith and instead, directed and encouraged certain law enforcement officers to obstruct and prevent the entry of Meredith upon the campus. Governor Barnett is also charged with violating the September 28, 1962 order of this court which adjudged him in civil contempt of the temporary restraining order of September 25, 1962. The violation is said to be of that portion of the order which directed that he purge himself by notifying all law enforcement officers and all other officers under his jurisdiction and command to maintain law and order at and around the University, and to cooperate in the execution of the orders of this court and the District Court to the end that Meredith be permitted to register and remain as a student at the University under the same conditions as apply to all other students. It is set out that Governor Barnett assumed this responsibility of maintaining law and order at the campus on September 30, 1962 and Meredith entered the campus without any interference or obstruction as a result of cooperation between the Mississippi State Highway Patrol and officials of the United States Department of Justice. However after entry, Governor Barnett is alleged to have wilfully failed to exercise his responsibility, authority and influence as Governor to maintain law and order with the result that disorder, disturbances and acts of violence designed to prevent and discourage the enrollment and attendance of Meredith as required by the court orders followed.

II.

Time has passed and the original order has been complied with to the end that Meredith is in school. And it is important to bear in mind as we consider the question here presented that the grant of jury trial to those charged with acts said to constitute criminal contempt and which at the same time constitute crimes would not leave a court bereft of power to enforce its orders. Here civil contempt was in order. See *Toledo Scale Co. v. Computing Scale Company*, 1923, 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719, affirming, 281 Fed. 488 (7 Cir., 1922); and *Sawyer v. Dollar*, D. C. Cir., 1951, 190 F. 2d 623, vacated as moot, 1952, 344 U. S. 806, 73 S. Ct. 7, 97 L. Ed. 628. The proceeding in civil contempt against Respondents is still pending in this court. It involves no question of jury trial. It was commenced for the purpose of obtaining compliance with the orders of the court, as distinguished from punishment for wrongful conduct under criminal contempt. We could have, upon violation of our orders, ordered Respondents taken into custody for confinement pending compliance with the court orders. *Gompers v. Buck's Stove & Range Co.*, 1911, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797. That Respondents happened to be Governor and Lieutenant Governor of their state would be no deterrent. *Sterling v. Constantin*, 1932, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375. A majority of the court did not think this to be a wise course at the time but it was nevertheless an available course of action. At any rate, the orders of the court as to Meredith have now been carried out, albeit with force and arms, as well as by virtue of civil contempt, and we come now to the demands of each of Respondents for jury trial in this proceeding to punish.

III.

But for the happenstance that the temporary restraining order of September 25, 1962 allegedly violated was that of this court rather than the District Court for the Southern District of Mississippi, Respondents would clearly be entitled to jury trials. Rule 42 (b), Fed. R. Crim. P., provides that a defendant in a criminal contempt proceeding is entitled to trial by jury in any case in which an Act of Congress so provides. Title 18, USCA, §402 provides that any person wilfully disobeying a lawful order of a District Court shall be prosecuted as provided in Title 18, USCA, §3691. This latter section provides for jury trial, if demanded, upon the violation of an order of the District Court if the act done be of such character as to also constitute a criminal offense under any Act of Congress, or under the laws of any state in which the act was done or omitted. It is provided that the jury trial shall conform "as near as may be the practice in other criminal cases."[2]

Respondents are charged with what amounts to a crime under Title 18, USCA, §242 in that the acts alleged constitute deprivation of the constitutional rights of Meredith under color of law, and Title 18, USCA, §1509 in that their alleged conduct constituted interference with United States marshals in the performance of their duties under orders of United States courts.[3] No one disputes this.

Two reasons are asserted by the United States as to why

[2]The jury trial provision does not apply to contempts committed in the presence of the court, something not here involved.
[3]They may now be tried for these crimes of which they are accused, but the trials must be in the District Court and to a jury.

Respondents should be deprived of jury trials. First, it is said that the order allegedly violated was not that of a District Court; and second, even if this is such an analagous situation as to be controlled by the District Court statute, nevertheless no jury trial is permitted under the statute where the United States is a party.[4]

IV.

My views as to this latter question may be succinctly stated. It is true that the jury trial provision does not apply where the order violated is "entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States." § §402, 3691, supra. And, so the argument goes, the order of September 25, 1962 was "entered in [a] suit or action brought or prosecuted in the name of or on behalf of the United States." This is on the theory that the order was obtained by the United States as *amicus* under an order vesting broad powers in the *amicus*.

I am unable to find any warrant in law for such a position. None has been cited to this court. My brothers have not enlightened me though some say it is so. I have read the *amicus* order and it did not make the United States a party.[5] Even this would hardly be sufficient for the order violated was entered in "a suit or action brought or prosecuted in the name of" James H. Meredith. There is not a

[4]This is not to disparage able counsel carrying out our direction to the United States to bring the criminal contempt proceeding against Respondents.

[5]The *amicus* order was granted *ex parte*. It can hardly be contended that the United States intervened for there was no motion served as is required by Rule 24(c), F. R. Civ. P., nor notice of any kind to defendants in *Meredith v. Fair*, cf. Rule 6(d), F. R. Civ. P.

word in *Faubus v. United States*, 8 Cir., 1958, 254 F. 2d 797, cert. den., 358 U. S. 829; or *Bush v. Orleans Parish School Board*, E. D. La., 1961, 191 F. Supp. 871, affirmed, 367 U. S. 908 that supports any such position. Authority to bring such a suit or action as that of *Meredith v. Fair* in the name of the United States has been refused by the Congress. And we are dealing with the right to jury trial — not with the right of the court to appoint the United States as *amicus* to help carry out orders in a pending cause. Therefore, this contention of the United States is rejected.

But in doing so, I do think it vital that the question be faced squarely and settled. To hold otherwise will mean that there will be no jury trial in criminal contempt cases even where the order is clearly that of a District Court whenever and wherever the United States is designated in the capacity of *amicus curiae* to assist a court in carrying out its orders and later procures a restraining order which is violated. Here the application for the restraining order was granted on the petition of the *amicus* and on the petition of the plaintiff and the position of the United States on this question is, of course, based on the *amicus* order.

V.

Thus it is that Respondents would be entitled to jury trial if the restraining order had been entered by the District Court, and we come to the main thrust of the demand. What we must decide is whether Respondents have that right where the order was entered by this court under the circumstances prevailing instead of the District Court. And it is no answer to say that there is no method prescribed by statute whereby this court an afford Respond-

ents a jury. The question is not what we can do, but what is the right of Respondents in the premises.

We turn in vain to the jury trial debates preceding the Civil Rights Act of 1957 for help in a situation such as this where a Court of Appeals has in effect acted as a District Court in entering the restraining order. This is to point up that the order was not sought in the District Court but was originally filed in this court when jurisdiction, or to say the least, co-jurisdiction had been returned by mandate to the District Court. There was no appeal pending or in view from the District Court. That court had the duty and the right under the law as we have heretofore known it to go forward.

Those debates were much concerned with retaining the right of jury trial under Title 18, USCA, §§402 and 3691, supra, as against an effort to permit suits in certain types of civil rights actions to be brought by the United States and thereby avoid the requirement of jury trial. The result of the debates was a compromise to allow suits by the United States in the area of voting rights only, and then to remove the provision for jury trial only where the fine does not exceed three hundred dollars and imprisonment is for no more than forty five days. Title 42, USCA, §§1971, 1995. The intent of Congress should be plain to all from this recent result that jury trial was to be preserved in all save voting rights cases.

Jury trials in criminal contempt proceedings in the District Court where the acts charged constituted crimes were at that time well established. *Michaelson v. United States, ex rel., Chicago, St. Paul, Minneapolis & Omaha Railway*

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What we are largely concerned with here is policy, a policy established by Congress for the District Courts by statute, and constitutional policy that is a part of the warp and woof of this country where crimes are charged. Article III, §2, Cl. 3 of the Constitution, and the VI Amendment thereto. That criminal contempts are not subject to jury trial as a matter of constitutional right, *Green v. United States,* 1958, 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672, does not obviate the fact that this constitutional policy was inherent in the District Court statute. And the avoidance of that policy by the simple medium of reserving jurisdiction to a Court of Appeals to enforce the same order that is by mandate made the order of the District Court, with the result that ancillary orders may be obtained

originally from the Court of Appeals is flagrant indeed. It is too simple. It thwarts the policy established by the Clayton Act, 18 USCA, §3691, and as reaffirmed in the debates leading to the enactment of the 1957 Civil Rights Act. That it was not done by design is unimportant. It is the result that counts.

That there was good reason for the reservation of jurisdiction and the injunctive order in this court is not now in dispute. I do not doubt the legality of the order of reservation under the authority of the All Writs Act, 28 USCA, §1651 up to the time that the order of this court was made the order of the District Court. However, from that point on legality for the present purposes of jury trial is at least limited. Any doubt could have been, but was not, resolved by a prior application to the District Court for the restraining order in question. The original application, I reiterate, was in this court; and my view is that original jurisdiction was at that time in the District Court at least to the extent of entitling Respondents to jury trial as they would be entitled to there.

To deny Respondents this right under the circumstances would be to establish a drastic and far reaching precedent,*

*If established as a precedent, it not only immediately involves Mississippi and Respondent Barnett, but their agents, employees, officers and successors and all persons in active concert or participation with them who may interfere with or obstruct by any means or in any manner the enjoyment of rights or the performance of obligations under the order of July 28, 1962 having to do with the admission and continued attendance of James H. Meredith at the University. This is the language of the restraining order of September 25, 1962, later entered as a temporary injunction and retained for enforcement in this court, two judges dissenting, rather than being remanded to the District Court. It is now pending in this court and every person in any way violating its broad terms may be subjected to trial for criminal contempt without benefit of jury trial.

and the fact that this is a hard case hardly indicates a different result. It goes without saying that we are dealing with a great and fundamental right, and one not lightly to be disregarded.

My views are buttressed by the strong, historically documented, dissenting opinion of Mr. Justice Black in which Chief Justice Warren and Mr. Justice Douglas concurred in *Green v. United States*, supra. They were of the view that, notwithstanding the established precedents, a defendant in criminal contempt who can be punished by severe prison sentences, as is the case here, is entitled to be tried by a jury after indictment by a grand jury in full accordance with all procedural safeguards required by the Constitution for "all criminal prosecutions". That case had to do with violation of court decrees outside the presence of the court, and the act charged, bail jumping, did not constitute a crime at that time so no statutory right to jury trial in criminal contempt was involved. The defendants were sentenced by the District Court to three years in prison.

The dissent did not dispute the established principle that there is no constitutional right in criminal contempt to a jury trial.[7] The dissenters would set aside these precedents as being repugnant to the Constitution. The problem of summary trial with punishment being meted out by the court whose order has been disobeyed is emphasized. See also Beale, Contempt of Court, Criminal and Civil, 1908, 21 Harv. L. Rev. 161; and Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in

[7]See the majority opinion and the supporting authorities set out in Footnote 14.

"Inferior" Federal Courts — A Study in Separation of Powers, 1924, 37 Harv. L. Rev. 1010.

That we should take a restrictive view of our power under these circumstances is made clear, as the Supreme Court has noted, by the history of the Act of 1831 from whence Title 18, USCA, §401, authorizing punishment for contempt, derives. *Nye v. United States*, 1941, 313 U. S. 33, 61 S. Ct. 810, 85 L. Ed. 1172. It was the Congressional intent to safeguard constitutional procedures by limiting courts to the "least possible power adequate to the end proposed." *In Re Michael*, 1945, 326 U. S. 224, 66 S. Ct. 78, 90 L. Ed. 30. Here the end sought is trial for criminal contempt, with Respondents to be accorded each and every right and safeguard to which they are entitled under the Constitution and laws of the United States.

I think it sufficient to say in conclusion, conceding the power of this court to enter the restraining order of September 25, 1962, a date after which the order of this court had been made the judgment of the District Court, and where the restraining order was not first sought in the District Court so as to give this court some basis for acting in aid of its appellate jurisdiction; that deprivation of the right to jury trial under the circumstances improperly by-passes the statutory safeguard of jury trial intended by Congress. For these reasons I would accord Respondents trial by jury.

This can be done by certifying such charges as are contained in the show cause order outstanding against Respondents to the appropriate District Court for trial by jury. See *Houston & North Texas Motor Freight Lines, Inc. v.*

Local No. 745, International Brotherhood of Teamsters, N. D. Tex., 1939, 27 F. Supp. 154. This conclusion gives effect to my belief that there must be a constancy and sameness about procedure if the rights of all are to be secure, and it cannot be gainsaid that rights lost to some today, through make-shift procedures invoked for special situations of the moment, may be the rights of others tomorrow. The ideal of liberty and justice under, and equality before the law will not long survive under such a grievous practice. Nor may the practice be justified here with the result that the right to jury trial is lost, unless it is that those who deny the ideal are to be deprived of its benefits and, of course, that is not our system. In short, we must abide the statutes applicable to the District Court when we act as a District Court.

VI.

The court is evenly divided on this question and it is fortunate that a final decision may be sought elsewhere before further action is taken. Congress has provided by statute for certification at any time by a Court of Appeals of any question of law in any civil or criminal case as to which instructions from the Supreme Court are desired. Title 28, USCA, §1254. The Supreme Court has promulgated rules to be followed in certifying questions to it. Rules 28 and 29. For example, and as heretofore noted, the question of the constitutionality of what is now Title 18, USCA, §3691 making a jury trial mandatory in certain criminal contempt actions was certified and answered. *Sandefur v. Canoe Creek Coal Company*, supra.

Certification is all the more proper in a case such as

this where respondents inescapably are charged and must be tried in their positions as Governor and Lieutenant Governor, respectively of the State of Mississippi, as well as individually. It is plain that they were carrying out the policy of that state, and federal courts have long accorded special consideration to the delicate relationship that exists between the Federal and State governments under the Constitution. *South Carolina v. United States*, 1905, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 264.

Here the question raised with regard to jury trial should be finally resolved in advance of trial. We cannot finally resolve it. I am glad to join in certification even though I believe that Respondents are entitled to jury trial.

VII.

Two brief comments appear to be in order following the formulation of the certified question, and the additional comments of the four members of the court who would deny jury trial.

First, the limited dissent of Judges Gewin and Bell referred to in Footnote 7 of their opinion with respect to the preliminary injunction entered October 19, 1962 should by no means be deemed insignificant. That dissent went to the heart of what has been the problem in this case since it was taken over by this court through the July 28, 1962 order. We dissented, not from the entry of the injunction, but because the court would not thereafter return the case to the District Court where it should have been all along; there to be handled, subject, of course, to the traditional mandamus procedure.

Under our court system the District Court speaks to litigants, while a Court of Appeals speaks, or should speak, to the District Court. This historical mode lends itself to the maintenance of judicial dignity and decorum, engenders and preserves respect for the law, and avoids an unseemly type of judicial scurrying about that results when there are no rules to follow.

I regret that the court will not also certify the following additional question, deemed by me at least to be of the utmost importance in the event of jury trial, so as to eliminate more makeshift procedures:

> "If Respondents are entitled to trial by jury for the criminal contempt with which they are charged, may the order to show cause charging them be referred to the District Court where the alleged acts of contempt were committed for trial?"

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 1 to 167 inclusive, constitute the original certificate of the said Court of Appeals to the Supreme Court of the United States including the certified question, the statement of the nature of the cause and of the facts on which the question arises, and the opinions of the judges in connection therewith, filed in the case entitled

UNITED STATES OF AMERICA

No. 20240 versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 9th day of April, A. D., 1963.

EDWARD W. WADSWORTH, CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

word in *Faubus v. United States*, 8 Cir., 1958, 254 F. 2d 797, cert. den., 358 U. S. 829; or *Bush v. Orleans Parish School Board*, E. D. La., 1961, 191 F. Supp. 871, affirmed, 367 U. S. 908 that supports any such position. Authority to bring such a suit or action as that of *Meredith v. Fair* in the name of the United States has been refused by the Congress. And we are dealing with the right to jury trial — not with the right of the court to appoint the United States as *amicus* to help carry out orders in a pending cause. Therefore, this contention of the United States is rejected.

But in doing so, I do think it vital that the question be faced squarely and settled. To hold otherwise will mean that there will be no jury trial in criminal contempt cases even where the order is clearly that of a District Court whenever and wherever the United States is designated in the capacity of *amicus curiae* to assist a court in carrying out its orders and later procures a restraining order which is violated. Here the application for the restraining order was granted on the petition of the *amicus* and on the petition of the plaintiff and the position of the United States on this question is, of course, based on the *amicus* order.

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To deny Respondents this right under the circumstances would be to establish a drastic and far reaching precedent,[6]

[6]If established as a precedent, it not only immediately involves Mississippi and Respondent Barnett, but their agents, employees, officers and successors and all persons in active concert or participation with them who may interfere with or obstruct by any means or in any manner the enjoyment of rights or the performance of obligations under the order of July 28, 1962 having to do with the admission and continued attendance of James H. Meredith at the University. This is the language of the restraining order of September 25, 1962, later entered as a temporary injunction and retained for enforcement in this court, two judges dissenting, rather than being remanded to the District Court. It is now pending in this court and every person in any way violating its broad terms may be subjected to trial for criminal contempt without benefit of jury trial.

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Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 1 to 167 inclusive, constitute the original certificate of the said Court of Appeals to the Supreme Court of the United States including the certified question, the statement of the nature of the cause and of the facts on which the question arises, and the opinions of the judges in connection therewith, filed in the case entitled

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No. 20240 versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 9th day of April, A. D., 1963.

EDWARD W. WADSWORTH, CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 107

UNITED STATES OF AMERICA

v.

ROSS R. BARNETT, GOVERNOR OF THE STATE OF MISSISSIPPI, AND PAUL B. JOHNSON, JR., LIEUTENANT GOVERNOR OF THE STATE OF MISSISSIPPI

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The court of appeals being equally divided on the question certified, there is no opinion of the court. The several opinions of the judges (C. 37, 61, 111, 129, 149) are unreported. A related order of the court of appeals (see C. 36) is reported at 316 F. 2d 236.

JURISDICTION

The certificate of the court of appeals was filed on April 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(3).

QUESTION PRESENTED

The question certified by the court of appeals reads as follows:

"Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress, are such persons entitled, upon their demand, to trial by jury for the criminal contempt with which they are charged?"

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent constitutional provisions, statutes, and rules involved are set forth in the Appendix, *infra*, pp. 57–63.

STATEMENT

These proceedings grow out the effort of James Meredith, a Negro, to attend the University of Mississippi. He applied for admission in January, 1961. Rebuffed, he filed a complaint in the United States District Court for the Southern District of Mississippi in May of the same year. Those proceedings, entitled *Meredith* v. *Fair*, have a long history. On December 12, 1961, after several continuances and interruptions of the hearing, the district court denied

a preliminary injunction.[1] 199 F. Supp. 754. The court of appeals, on January 12, 1962, affirmed, but recommended a prompt trial on the merits. 298 F. 2d 696. After trial, on February 3, 1962, the district court denied all relief and dismissed the complaint. 202 F. Supp. 224. On February 12, the court of appeals denied an application for an injunction pending appeal. 305 F. 2d 341. While the case was pending on appeal, Meredith was criminally charged before a Justice of the Peace for Hinds County with false swearing in a voter registration application, and he was arrested. On June 12, 1962, on Meredith's motion, the court of appeals enjoined further prosecution of those proceedings. Finally, on June 25, 1962, the court of appeals rendered its decision, reversing the district court and directing the entry of an injunction requiring the University of Mississippi to admit Meredith. 305 F. 2d 343.

But that was not to be the end of the story. Meredith requested the court of appeals to issue its mandate forthwith. The court declined on July 9. On July 17, 1962, the mandate issued in due course. Promptly, the defendants in the original action moved Judge Cameron (who had not been on the panel) to stay the mandate pending their application for certiorari. On July 18, Judge Cameron granted the requested stay. On July 27, the court of appeals set aside the stay and directed that its mandate be amended and recalled in order to make "explicit the

[1] Certified copies of the orders of the district court and of the court of appeals referred to herein have been lodged with the Clerk of the Court.

meaning that was implicit in [the] [c]ourt's conclusion as expressed through its opinion * * * dated June 25, 1962." 306 F. 2d 374, 378 (C. 3). The amended mandate reversed the judgment and remanded the case to the district court with directions "to grant all relief prayed for * * * and to issue forthwith a permanent injunction against each and all of the defendants-appellees [the University Board of Trustees and University officials] * * * enjoining and compelling each * * * of them to admit * * * Meredith, to the University of Mississippi * * *." The court further directed that "[s]uch injunction shall in terms prevent and prohibit said defendants-appellees * * * from excluding * * * [Meredith] from admission to continued attendance at the University of Mississippi * * *." (C. 3). In implementation of its mandate the court of appeals also stated that it was therewith issuing its own order requiring the Board of Trustees and University officials to admit Meredith to the University of Mississippi and to refrain from any act of discrimination relating to his admission or continued attendance, the injunction to remain in effect until "such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders * * *" (C. 3). On July 28 the court of appeals entered a formal order to that effect.

On July 28 and July 31, Judge Cameron again intervened, staying the court's orders of July 27 and July 28. On August 4, the court of appeals vacated the stays. Judge Cameron issued a fourth stay on

August 6, but, on September 10, Mr. Justice Black vacated all of these stays (C. 4).[2] Finally, on September 13, 1962, the district court entered the injunction.

Meredith was scheduled to enroll at the University on September 20. When it became apparent that there might be obstruction of the courts' decrees, the United States applied to the court of appeals for an order allowing it to appear in the case. That court first ascertained whether the district court would enter such an order and, upon its declination, adjudged (C. 5):

> It appearing from the application of the United States, filed this day, that the interests of the United States in the due administration of justice and the integrity of the processes of its courts should be presented in the proceedings * * *.
>
> It is ordered that the United States be designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before this Court and by reason of the mandates and orders of this Court of July 27, 28, 1962, and subsequently thereto, also before the District Court for the Southern District of

[2] The order of Mr. Justice Black further provided "that the judgment and mandate of the Court of Appeals shall be effective immediately" and enjoined the University officials, pending final action by this Court on their petition for writ of certiorari, from taking any steps to prevent enforcement of the judgment and mandate of the court of appeals. 83 S. Ct. 10 (C. 4).

On October 8, 1962, this Court denied a petition for certiorari seeking review of the court of appeals' orders of June 25, July 27, and July 28, 1962. 371 U.S. 828.

Mississippi to accord each court the benefit of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States."

The foregoing order was entered on September 18. The next day, September 19, the Chancery Court of Jones County, Mississippi, in a proceeding entitled *Meadors* v. *Meredith*, issued an injunction against Meredith, the University Board of Trustees, various University officials, the United States Department of Justice, the Federal Bureau of Investigation, the Office of the Attorney General of the United States, and all United States Deputy Marshals, enjoining each of them "from doing anything or performing any act, the execution of which is intended to enroll and register the Negro, James Meredith, as a student in the University of Mississippi" (C. 6). The federal defendants promptly removed the State court suit to the United States District Court for the Southern District of Mississippi (where *Meredith* v. *Fair* was pending) and there moved for dissolution of the injunction. The district court (acting through both Judge Mize and Judge Cox), declined to enter an immediate order and set the matter for hearing on September 24,[3] three days *after* Meredith's

[3] The district court ultimately vacated the state court injunction on October 2, 1962.

scheduled enrollment under the mandate of the court of appeals. On the same day, September 20, 1962, the United States, as *amicus curiae* in *Meredith* v. *Fair*, moved the district court for a temporary restraining order prohibiting the arrest of Meredith by local officials and enjoining the implementation of a measure passed that morning by the Mississippi Legislature which would have prevented the University officials from enrolling Meredith. The court (both district judges again acting together) enjoined Meredith's arrest on that day, should he present himself for admission as scheduled, but declined all further relief, setting the hearing on the new legislative act for September 24, after the date for admission had passed.

Having failed to obtain an order from the district court implementing the mandate of the court of appeals by clearing the way for Meredith's registration on the date scheduled, the United States applied to the court of appeals for an appropriate order. That court required government counsel to afford the district court a second opportunity to enter the necessary injunction. The district court again declined to act. Then, on the afternoon of September 20, the court of appeals issued its own order enjoining enforcement of the legislative measure and the two State court decrees purporting to bar Meredith's enrollment (C. 6, 7).

Meredith's attempt to register at the University later that afternoon was rebuffed. The same evening—September 20—the United States moved the district court for an order citing the Chancellor, the

Registrar and the Dean of the College of Arts and Sciences of the University to answer for civil contempt. A rule to show cause was issued and a hearing was held on September 21. At the conclusion of the hearing, the district court held all three defendants not guilty of contempt.

On September 21, 1962, the court of appeals, again upon application of the United States as *amicus curiae*, entered an order requiring the Board of Trustees to show cause why its members should not be held in civil contempt for failing and refusing to comply with the court's order of July 28, 1962. On September 22, 1962, also upon application of the United States, the court of appeals entered a further and similar show cause order against certain other named administrative officials of the University of Mississippi (C. 8, 9). On September 24, 1962, the court of appeals convened *en banc* and heard testimony describing the action of the Board of Trustees, the administrative officials of the University, Governor Ross Barnett and other State officials, and showing that, although Meredith had presented himself for admission, he had not been admitted to the University as previously ordered by the court[4] (C. 9).

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[4] This evidence included a resolution of the Board of Trustees dated September 20, 1962 by which the Board invested Governor Barnett with "full authority * * * of [the] Board to act upon all matters pertaining to * * * the registration, * * * admission * * * and/or attendance * * * of James H. Meredith" (C. 9-10), and the Governor's published television speech to the people of Mississippi proclaiming "that the operation of the public * * universities * * * of the State of Mississippi is vested in the duly-elected and appointed officials of the State of Mississippi", and directing

At the hearing on September 24, 1962, the President of the Board of Trustees and the Registrar of the University indicated that they were ready to comply with the orders of the court of appeals. The Registrar announced that he would be available in Jackson, Mississippi not later than 1:00 p.m. on September 25, 1962, for the purpose of registering and admitting Meredith as a student. (C. 11, 12). At the conclusion of the hearing, the court of appeals entered an order requiring compliance with its order of July 28, 1962, and requiring the Board of Trustees both to rescind its action appointing Governor Barnett as agent with respect to Meredith's registration and admission and also to instruct the University officials to register Meredith (C. 12). The order further required the Registrar to be available at Jackson, Mississippi, at the office of the Board of Trustees, at specified hours on September 25, 1962, for the purpose of registering Meredith (C. 12).

On the evening of September 24, 1962, the government presented to the court of appeals an action ancillary to the case of *Meredith* v. *Fair*, entitled *United States* v. *State of Mississippi, et al.*[5] In connection with its complaint in that action, the United

each such official "to uphold and enforce the laws duly and legally enacted by the Legislature of the State of Mississippi, regardless of * * * [the Federal Government's] unwarranted and illegal and arbitrary usurpation of power; and to interpose the State Sovereignty and themselves between the people of the state and any body-politic seeking to usurp such power" (C. 10–11).

[5] The complaint and subsequent pleadings and orders in the action brought by the United States were captioned as follows:

States applied for, and the court of appeals, on the morning of September 25, issued, a temporary restraining order restraining the State of Mississippi and Governor Barnett, and their agents, employees, officers and successors, together with all persons in active concert or participation with them, from interfering with or obstructing by any means or in any manner the enjoyment of rights or the performance of obligations under the court of appeals' order of July 28, 1962, and the district court's order of September 13, 1962, both of which required the enrollment of Meredith at the University of Mississippi (C. 13–16).

Despite the outstanding court orders, Meredith was prevented from registering at the office of the University Board in Jackson. On the evening of the same day—September 25—the court of appeals entered an order requiring the defendant Barnett to appear personally before the court three days hence to show cause why he should not be held in civil contempt of the temporary restraining order entered by the court of appeals that day (C. 16). On the next day, September 26, Meredith's attempt to enroll at the campus at Oxford was again rebuffed, and the

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No. 19475

JAMES H. MEREDITH, APPELLANT

v.

CHARLES DICKSON FAIR ET AL., APPELLEES

UNITED STATES OF AMERICA, AMICUS CURIAE AND PETITIONER

v.

STATE OF MISSISSIPPI, ET AL., DEFENDANTS

court of appeals entered a similar order to show cause addressed to the defendant Johnson, fixing the time of hearing for September 29, 1962 (C. 17).

On September 28, 1962, the court of appeals, sitting *en banc*, heard the order to show cause as to the defendant Barnett. At the conclusion of the hearing the court adjudged that Barnett was in civil contempt and that such contempt was continuing. The court ordered that he should be committed to the custody of the Attorney General of the United States and pay a fine to the United States of $10,000 per day unless, on or before October 2, 1962, at 11:00 a.m., he showed to the court that he was fully complying with the terms of the restraining orders entered on September 25, 1962. Specifically, he was to show that he had notified all law enforcement officers and all other officers under his jurisdiction or command to cease forthwith all resistance to and interference with the orders of the court of appeals and the district court, to maintain law and order at and around the University and to cooperate with the officers and agents of the court of appeals and the district court, to the end that Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as applied to all other students.* (C. 20–21).

On September 29, 1962, a three-judge panel of the court of appeals heard the order to show cause addressed to the defendant Johnson; made findings of

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*Judges Jones, Gewin and Bell dissented from that part of the judgment imposing a fine upon the defendant Barnett (C. 21).

fact; adjudged that Johnson was in civil contempt of the temporary restraining order entered September 25, 1962, and that such contempt was continuing; and ordered that Johnson pay a fine to the United States of $5,000 per day unless on or before October 2, 1962, at 11:00 a.m. he showed to the court that from and after the time of the issuance of the order he had been in full compliance with the terms of the restraining order, that he intended to comply in the future, and that he would, when acting as Governor of Mississippi, give the same instructions to all law enforcement officers and all other officers under his jurisdiction and command as the defendant Barnett was required to give under the order of the previous day (C. 21–23).[1]

On October 2, 1962, the defendant Barnett appeared before the court of appeals through his counsel, who

[1] On September 30, 1962, the President of the United States issued a proclamation under 10 U.S.C. 332, 333 and 334, reciting that the Governor of Mississippi and other officials of that State, individually and in unlawful assemblies, combinations and conspiracies, had been willfully obstructing enforcement of orders of the district court and the court of appeals; that such assemblies, combinations and conspiracies obstructed execution of the laws of the United States, impeded the course of justice under those laws, and made it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; that the President had not received from the Governor adequate assurances that the court orders would be obeyed and that law and order would be maintained. The proclamation commanded all persons engaged in such obstructions of justice to cease and desist therefrom and retire peacefully forthwith. The President also issued an executive order as a result of which a large force of United States Marshals and a part of the Army and Air Forces of the United States were employed for the enforcement of the orders of the court of appeals (C. 25–27).

stated that the Governor was in full compliance with the court's orders and would fully comply in the future to the extent of his ability. The matter was then continued until October 12, 1962, for further hearing before the court in *en banc* (C. 23). On October 12, 1962, the defendant Barnett again appeared by counsel, who offered no proof bearing on Governor Barnett's conduct following the contempt judgment, but retracted their statements that the Governor intended to comply with the orders of the court (C. 24). On October 19, 1962, the defendant filed a response through his counsel, to which he attached a statement which he had publicly delivered on October 17, asserting in substance that he reserved the right to determine whether compliance with the court's orders was consistent with his rights and duties as Governor of Mississippi (C. 23–24).

On October 19, 1962, the court of appeals denied a motion filed by the State of Mississippi to dissolve the temporary restraining order and to dismiss the contempt proceedings, and entered a preliminary injunction, noting that the proceeding before the court was ancillary to the original lawsuit and that the court had ample power to proceed against any party, including the State of Mississippi, which was shown to be engaged in a wilful, intentional effort to frustrate the court's injunction (C. 27–31).[4]

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[4] On February 18, 1963, after granting the motion of the United States to be added as a party respondent, this Court denied a petition for certiorari seeking review of sixteen orders of the court of appeals entered between September 18 and October 19, 1962, including the order designating the United States as amicus curiae and the temporary restraining order of

Thereafter, on November 15, 1962, the court appointed the Attorney General of the United States and such Attorneys in the Department of Justice as he might designate, to prosecute criminal contempt proceedings against the defendants Barnett and Johnson pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of the court dated September 18, 1962. On January 4, 1963, an order to show cause was issued, on the application of the United States (C. 31–32), reciting that probable cause had been shown for finding defendants guilty of the following acts done "for the purpose of preventing compliance with this Court's order of July 28, 1962, and of the similar order of the United States District Court for the Southern District of Mississippi, entered on September 13, 1962, and * * * in wilful disobedience and defiance of the temporary restraining order of this Court entered on September 25, 1962" (C. 32–34):

> (a) Barnett, on September 25, 1962, wilfully prevented Meredith from entering the Trustee's offices and enrolling as a student;
>
> (b) Johnson, on September 26th, acting under the direction of Barnett, wilfully prevented Meredith from entering the University campus and enrolling as a student;
>
> (c) Barnett and Johnson, on September 27th, not only wilfully failed to take measures to preserve law and order on the University campus but instead encouraged the Mississippi Highway Safety Patrol and vari-

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September 25, 1962, which underlies the present contempt proceedings. 372 U.S. 916.

ous Sheriffs and deputy Sheriffs to prevent Meredith's entry; and

(d) Barnett, on September 30th, knowing that the failure of the Mississippi Highway Safety Patrol to maintain peace and order on the University campus would result in obstruction of the court's order of July 28, 1962, nevertheless wilfully failed to exercise his authority as Governor to maintain law and order.[9]

Defendants then filed ten motions, only one of which—their demand for trial by jury—is relevant here.[10] The court of appeals heard argument *en*

[9] The Chief Judge of the court of appeals then directed the Clerk to assign to the case a new number, No. 20,240, and a new caption, "*United States* v. *Ross R. Barnett and Paul B. Johnson, Jr.*" (C. 34). For the previous caption, see n. 5, *supra*, p. 10.

[10] The motions were as follows:

1. Motion and plea of the State of Mississippi to dismiss the proceeding as being in violation of the Tenth and Eleventh Amendments to the Constitution.

2. Motions of Barnett and Johnson to dismiss all proceedings in original Action No. 20,240 for lack of process.

3. First alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 and all contempt proceedings in cause No. 19,475 based on improper and insufficient application.

4. Second alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 for lack of venue or jurisdiction.

5. Third alternative motions of Barnett and Johnson to dismiss all pending proceedings in Criminal Contempt for lack of Grand Jury presentment or indictment.

6. Demands of Barnett and Johnson for trial by jury.

7. Fourth alternative motions of Barnett and Johnson to dismiss all proceedings in original action No. 20,240 for lack of jurisdiction to summons a constitutional jury.

banc, but without the participation of Judge Hutcheson who was ill (C. 32, 36). The judges, being evenly divided upon the defendants' right to a jury trial, certified the question to this Court. Accompanying the certified question are an opinion of Chief Judge Tuttle and Circuit Judges Rives, Brown and Wisdom, concluding that no jury is required (C. 37), and separate opinions of Judges Cameron (C. 61), Jones (C. 111), Gewin (C. 129) and Bell (C. 149), each concluding that the defendants are entitled to trial by jury.

SUMMARY OF ARGUMENT

I

A statutory right to trial by jury is claimed under 18 U.S.C. 402 and 3691 because the acts of contempt charged also amount to crimes. But, for two independent reasons, the statutes invoked are inapplicable here.

A. Defendants have no right to trial by jury in the premises because the order allegedly violated was issued by a court of appeals. The statutes relied on grant a right to jury trial only in cases of contempt of a district court order. The text itself is explicit on

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8. Motions of Barnett and Johnson for severance.

9. Motion of Johnson to strike the third charge contained in the order to show cause of date January 4, 1963.

10. Motion of Barnett to strike the third and fourth charges contained in the order to show cause of date January 4, 1963.

After oral argument, a majority of the members of the court sustained a motion of the United States to strike the motion and plea numbered 1, overruled or denied the motions numbered 2, 3, 4, 5 and 7, and reserved its ruling on the motions numbered 8, 9 and 10 (see 316 F. 2d 236).

the point. Nor is the language of the statutes inadvertent. The legislative history is plain that the exclusion of court of appeals proceedings from the jury trial requirement was purposeful. The exception reflects the practical difficulties of holding a trial by jury at the appellate level, and recognizes the fact that courts of appeals, sitting in panels of several judges, will not abuse their contempt power. If any doubt remains, the structure of the original statute, outlining the jury trial procedure in terms of the existing district court practice in other cases, makes it unmistakably clear that Congress deliberately restricted the requirement of trial by jury to contempts of district court orders. Finally, there is no merit to the suggestion that the court of appeals was here acting as a district court and must accordingly follow the district court procedure. The court was exercising its ancillary jurisdiction to effectuate its own orders, entered on appeal. The court of appeals acted out of compelling necessity, after the district court denied relief.

B. Defendants have no statutory right to trial by jury for the further reason that the order they are charged with disobeying was entered in an action brought and prosecuted by the United States, and the statutes invoked expressly exempt such cases from the jury trial requirement. While the United States intervened in a pending private suit, nominally as *amicus curiae,* it was accorded the prerogatives of a party and it has, from the beginning, asserted its in-

dependent interest in preserving the integrity of the judicial system and vindicating the authority of its courts, as it plainly had a right to do. In every meaningful sense, the order which defendants are alleged to have violated was entered in a proceeding "brought or prosecuted" by the United States. Arguments invoking procedural niceties cannot alter that basic fact. For the exemption from the jury trial requirement in favor of the United States is not a technical rule. As the legislative history shows, the provision reflects the fundamental distinction between private litigation and proceedings to vindicate a public right. For good reasons, Congress chose to exempt the United States from the hazards of trial by jury when the injunctive orders it had secured were wilfully disobeyed.

II

There is no constitutional right to trial by jury in contempt proceedings. *Green* v. *United States*, 356 U.S. 165, forecloses that claim. Indeed, throughout centuries of Anglo-American history, it has been deemed essential to permit a court (perhaps especially an appellate court) to adjudge contempts of its own orders. The dignity of the judiciary and the effective functioning of the judicial system require no less. Such was the original understanding, and there is no occasion to reconsider the rule in this case.

ARGUMENT

In this extraordinary case the defendants are charged with criminal contempt of a federal court order. Although the alleged contemnors are the Governor and Lieutenant Governor of a State, they stand before the bar on the same footing with other citizens. Just as the highest executive officials of a State are obligated to obey federal authority, *Cooper* v. *Aaron*, 358 U.S. 1, 18–19; *Sterling* v. *Constantin*, 287 U.S. 378, 397–398, so are they entitled, when charged with flouting that authority, to the same rights and privileges—no more and no less—as the law confers upon ordinary citizens.

Defendants claim a right to trial by jury upon the ground that the alleged contempts are also crimes under 18 U.S.C. 242 and 1509. They base the claim upon statutory provisions derived from the Clayton Act, 38 Stat. 730, 738, 739 (now 18 U.S.C. 402, 3691) and, alternatively, upon the Constitution. But as we show below, the statute does not apply for two reasons: first, because it governs only prosecutions for contempt of an order "of any district court of the United States," whereas this is a proceeding for contempt of an order of a court of appeals; and second, because the statute excepts contempts committed in disobedience of an order entered "in any suit or action brought or prosecuted in the name of, or on behalf of the United States," and defendants are charged with wilful disobedience of such an order. The constitutional claim is foreclosed by *Green* v. *United States*, 356 U.S. 165.

I

DEFENDANTS HAVE NO STATUTORY RIGHT TO TRIAL BY JURY

A. DEFENDANTS HAVE NO STATUTORY RIGHT TO TRIAL BY JURY BECAUSE THE CHARGES ARE OF WILFUL DISOBEDIENCE OF AN ORDER OF A COURT OF APPEALS

1. *The plain meaning of the words of 18 U.S.C. 402 and 3691 limits the statutory right of trial by jury to contempts of orders of a district court.*

The historic practice in the United States, as at common law, has been to try contempts of court before a judge sitting without a jury. The only relevant statutes modifying the general rule are 18 U.S.C. 402 and 3691.[11] Section 402 provides that any person wilfully disobeying any lawful order—

> of any district court of the United States or any court of the District of Columbia,

if the act done is also a criminal offense, shall be prosecuted as provided in Section 3691, which grants a right to jury trial in those cases. Section 402 then excepts contempts committed in the presence of the court or consisting of disobedience of an order made in an action brought or prosecuted in the name of the United States, and concludes with the declaration that these exceptions—

> and all other cases of contempt not specifically

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[11] Whether or not it governs criminal contempt proceedings in the courts of appeals, Rule 42(b) of the Rules of Criminal Procedure cannot affect the defendants' statutory right to trial by jury, for the Rule directs jury trial only where "an act of Congress so provides." Other statutes directing trial by jury of contempt proceedings, under certain circumstances, in particular classes of cases are obviously inapplicable here. See,

> embraced in this section may be punished in conformity to the prevailing usages at law."[11]

Contempts consisting of disobedience of an order of a court of appeals are not specifically embraced in Section 402 and therefore may be punished in conformity with the established usage of trying the issues to the court. Section 402 is, by its own terms, confined to disobedience of the orders "of any district court of the United States or any court of the District of Columbia." At least insofar as courts outside the District of Columbia are concerned, this phrase cannot be made to include a court of appeals without distorting the plain meaning of the words.

Section 3691 emphasizes the limitation. Omitting portions not relevant to this branch of the argument, it provides—

> Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

Here again we find a careful limitation to specified contempts of the orders of a district court.

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e.g., 18 U.S.C. 3691 (labor disputes); 29 U.S.C. 528 (Labor Reform Law of 1959); 42 U.S.C. 1995 (voting rights).

[11] The full text of Section 402 appears at pp. 58–59, *infra*.

Even if the words stood alone one could not indulge the gratuitous assumption that these apparently carefully-drawn limitations were only the result of inadvertence. The courts of appeals antedate the original statute as well as the revision. But we need not rely upon the words alone. The plain meaning of the words is confirmed by the legislative history which shows beyond a peradventure that Congress limited Sections 402 and 3691 to the district courts, not by accident but because it desired not to require a jury for trial of alleged contempt of an order of an appellate court.

2. *The legislative history shows that Congress intended to exclude from the requirement of trial by jury contempts consisting of disobedience of an order of a court of appeals.*

Sections 402 and 3691 of the Criminal Code derive from Sections 21, 22, and 24 of the Clayton Act, 38 Stat. 730, 738, 739. See Reviser's Note to 18 U.S.C. 402.[11] Specifically, Section 21 of the Clayton Act (App., *infra*, p. 61) is the source of the language in the first paragraph of the two Criminal Code provisions limiting the subject matter to cases of disobedience of orders issued by district courts which constitute a criminal offense. Section 22 (App., *infra*, pp. 61–62) established the procedure. It conferred the right to trial by jury now incorporated in 18 U.S.C. 3691 and fixed the penalty as now provided in the second paragraph of Section 402. Finally, Sec-

[11] As the Note makes clear, the origin of these Criminal Code provisions does not restrict their application to Clayton Act cases. Though otherwise narrow in scope, Sections 402 and 3691 govern criminal proceedings without regard to the nature of the underlying cause of action.

tion 24 (App., *infra*, p. 63), in language reproduced in the last paragraph of both Sections 402 and 3691, exempted contempts committed in, or near, the presence of the court and those resulting from disobedience of an order issued "in any suit or action brought or prosecuted in the name of, or on behalf of, the United States," providing (as does 18 U.S.C. 402 today) that such contempts and all others not covered might be punished "in conformity to the usages at law and in equity now prevailing." Accordingly, we turn to the history of those Clayton Act provisions.

The story begins with several early attempts to provide for trial by jury in criminal contempt cases. The first was a bill introduced in 1896 by Senator Hill of New York (S. 2984, 54th Cong., 1st Sess.) which passed the Senate but died in the House. See S. Rep. No. 827, 54th Cong., 1st Sess.; 28 Cong. Rec. 6320, 6443. There followed a series of similar measures sponsored by Congressman Bartlett. See Frankfurter and Greene, *The Labor Injunction*, pp. 190–194. Then came another unsuccessful effort initiated by Representative Clayton in 1911 (H.R. 13578, 62nd Cong., 1st Sess.). Both the Hill and Clayton bills made the jury trial requirement applicable "in all courts of the United States except the Supreme Court." See Hearings on Contempt of Court before the House Committee on the Judiciary, December 7, 8, 9, and 11, 1911, 62nd Cong., 2d Sess., pp. 4, 10. The Clayton bill met opposition on several grounds. Among other things, it was criticized for providing trial by jury in appellate courts which had no juries. Representative Clayton accordingly

redrew his proposal and submitted a second bill at the Second Session of the Sixty-Second Congress (H.R. 13578)."[14] This time he made it clear that the requirement of a jury trial applied only to trial courts. Mr. Clayton himself explained (48 Cong. Rec. 8778):

> I want to refer as briefly as I may to some objections that were made to the bill that I introduced which followed in the same fashion the Hill bill. * * *
>
> The next criticism was that it provided for contempt in courts where there were no jurors. We answered that by confining the operation in this bill to the circuit courts, to the courts where there are juries and *we exempt its operation in the courts of appellate jurisdiction.* We met that criticism in that way. There has been none that I know of or little, if any, complaint made against abuse of the process of

[14] Another criticism leveled at the first Clayton contempt bill was that it purported to require trial by jury even where the contempt did not also constitute a criminal offense. Defending his second bill, Clayton noted that he had met this objection (48 Cong. Rec. 8778): "* * * The first criticism that was made upon that bill and upon the Hill bill, in the hearings had before the committee, was that the bill might be considered as in pari materia section 268 of the judiciary code, formerly section 725 of the Revised Statutes. I think I violate no confidence when I say that that criticism came from the Attorney General of the United States. In framing this bill which is now before the House we met that criticism and obviated it. An examination of this bill will show that section 268 stands independently, and that this bill adds to the law by providing that in cases of a criminal nature, and of a criminal nature only, shall there be a right of trial by jury."

A further objection related to the applicability of the bill to contempts of orders obtained by the United States. See *infra*, p. 41, n. 24.

> contempt by appellate courts. It has been in the district courts, in the circuit courts, in the courts of first instance, where this abuse has occurred, and this bill limits it in effect to the operation of those courts of first instance where the abuses have occurred and do now occur. [Emphasis added.][15]

Representative Clayton's statement was confirmed by two other spokesmen for the bill, both members of the House Judiciary Committee which considered and reported the bill—Representative Floyd of Arkansas and Representative Davis of West Virginia. Representative Floyd said on the floor of the House (48 Cong. Rec. 8780):

> It [the bill] is also limited to proceedings in the district courts of the United States, which courts have proper machinery for juries. * * *

Representative Davis said (48 Cong. Rec. App. 314):

> It is also to be observed that the bill is to be confined to the district courts of the United States, which have constantly at hand the neces-

[15] It is clear from Clayton's statement that in speaking of "circuit courts," he was referring to the old circuit courts, and not to the courts of appeals. The jurisdiction of the old circuit courts was both trial and appellate until the Evarts Act of 1891 eliminated their appellate jurisdiction. Act of March 3, 1891, 26 Stat. 826. For twenty years there were two sets of federal trial courts—the district courts and the circuit courts. The circuit courts were abolished by the Judicial Code of 1911, Act of March 3, 1911, § 289, 36 Stat. 1087, 1167, which transferred their functions and powers to the district courts. See Hart and Wechsler, *The Federal Courts and the Federal System*, p. 46 (1953). Thus, in 1912, when Representative Clayton uttered the language quoted in the text, there were no circuit courts. Clayton's meaning, however—that his bill was confined to trial courts and did not extend to appellate courts—is unmistakable.

> sary machinery for the conduct of a jury trial and which are in all things subject to legislative regulation."[16]

See also 48 Cong. Rec. 8794; 8802; App. p. 318.

While the bill under discussion was defeated in the Senate, its provisions were revived the next year and incorporated in the bill which became the Clayton Act (H.R. 15657, 63rd Cong., 2d Sess.). Indeed, in approving the final Clayton bill, the Senate Committee (S. Rep. No. 698, 63rd Cong., 2d Sess., p. 18) merely referred back to the House Report on the Clayton contempt bill of the previous year (H. Rep. 612, 62nd Cong., 2d Sess.) stating:

> The remaining sections of the bill, 15 to 23, inclusive, are substantially the same as the provisions of the two separate bills (H.R. 23635 and H.R. 22591, 62d Cong.), known as the Clayton injunction and contempt bills, which were considered and passed by the House of Representatives at the last Congress, but failed of passage in the Senate. They deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the court. The reports upon these bills made to the House in the last Congress are comprehensive and explain in detail

[16] In pointing out that the district courts were "in all things subject to legislative regulation", Representative Davis was alluding to the doubt which then existed, and still exists, as to whether Congress constitutionally may require trial by jury in contempt cases arising out of disobedience to orders of this Court, which derives its existence and powers from the Constitution. See *Ex parte Robinson*, 19 Wall. 505, 510; Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts* in *"Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010.

their purpose, and for convenience are adopted as a part of this report.

The objections to requiring trial by jury in a court of appeals, while not insuperable, were real. Appellate courts have no juries, as several congressmen recognized, and no regular procedure for summoning a venire. Their geographical jurisdiction is different from the confines of the judicial districts from which juries are usually summoned. Any trial before an appellate court sitting with a jury would be awkward and time-consuming. Would each of the three judges (or today each of a full bench of nine judges) have the privilege of questioning witnesses, participate in the rulings on evidence and give instructions to the jury? Conversely, it was difficult, if not impossible, to make a case for the need for jury trials in appellate courts. The participation of at least three judges in any court of appeals would be substantial assurance against the risk of arbitrariness or prejudice such as might occasionally be evidenced by a single judge. The cases in which some congressmen felt that the power to punish for contempt might be abused—prosecutions for picketing, trespass, assault and battery and other instances of violence in disobedience of an injunction in a labor dispute—would seldom, if ever, arise in an appellate court.

In sum, the legislative history of the Clayton Act plainly shows that the language confining the jury trial requirement to contempt cases involving district court orders was intentionally designed to exclude the courts of appeals.

3. *The statute contains other internal evidence of intent to exclude from the requirement of trial by jury contempts of orders of a court of appeals.*

In providing for trial by jury Section 22 of the Clayton Act spoke of impaneling a jury from the jurors "then in attendance" or the summoning of jurors "as provided by law" and their selection and impaneling "as upon a trial for misdemeanor." 38 Stat. 739 (App., *infra*, pp. 61–63). Then, as now, no provision was made for the selection or impaneling of jurors in the courts of appeals. The governing statutes, all antedating the Clayton Act (see 36 Stat. 1165), speak of "the judicial district" (28 U.S.C. 1861), "a district judge" (28 U.S.C. 1863), "the district" (28 U.S.C. 1864; 1865), "district court" (28 U.S.C. 1866), "any district court" (28 U.S.C. 1869), "district courts" (28 U.S.C. 1871).

Similarly, Section 23 of the Clayton Act provided that "any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases." 38 Stat. 739 (App., *infra*, p. 63). Since Congress had long since abolished the writ of error for the review of decisions of the courts of appeals in criminal cases and substituted discretionary review by certiorari (26 Stat. 826), that provision could operate only with respect to district courts.

Nor can it be supposed that the drafters of the Clayton Act ignored the possibility of contempt of appellate court orders. Section 11 (38 Stat. 734–736) expressly referred to the circuit courts of appeals in conferring power upon them to enforce orders of the

Interstate Commerce Commission, the Federal Reserve Board and the Federal Trade Commission; and it must have been contemplated that disobedience of the enforcement decree might give rise to contempt proceedings.

The plain fact is that the jury trial provision was intentionally restricted to district court proceedings. Then, as now, Congress well knew how to provide for all courts.[17] Section 20 of the Clayton Act (App., *infra*, pp. 60–61) curbing the power to issue injunctions in labor disputes explicity applied to "any court of the United States." In the face of the predecessor of Section 401 of the Criminal Code which authorized any "court of the United States" to punish contempt of its orders,[18] the limiting language in what is now Section 402 was unmistakably deliberate.

The defendants urged below that the jury trial requirement of Section 402, while not in terms applicable to contempt proceedings before courts of appeals

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[17] See, *e.g.*, the provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 528:

"No person shall be punished for any criminal contempt allegedly committed outside the immediate presence of the court in connection with any civil action prosecuted * * * *in any court of the United States* under the provisions of this chapter unless the facts constituting such criminal contempt are established by the verdict of the jury in a proceeding in the district court of the United States, which jury shall be chosen and empaneled in the manner prescribed by the law governing trial juries in criminal prosecutions in the district courts of the United States." (Emphasis added.)

[18] Then Section 268 of the Judicial Code, 36 Stat. 1163, derived from the Act of March 2, 1831, 4 Stat. 487, of which this Court said that it "applies to all courts." *Ex parte Robinson*, 19 Wall. 505, 510–511.

generally, does encompass such proceedings in the Court of Appeals for the District of Columbia Circuit, pointing out that the jury trial requirement applies to "any court of the District of Columbia." From this premise, the defendants contended that the language "any court of the District of Columbia" must include all of the other ten courts of appeals under Article IV, Section 2, Clause 1, of the Constitution, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The argument is without merit. The words relied on—"or any court of the District of Columbia"—appeared for the first time, without comment, in the second committee print of the final Clayton Act bill (H.R. 15657, 63rd Cong.) which, in this provision (ultimately Section 21) otherwise tracked the contempt bill introduced by Representative Clayton the year before. See Hearings before the House Committee on the Judiciary on Trust Legislation, 63rd Cong., 2d Sess., p. 1864, 1884 (1913–14). No reason for this change appears in the legislative history of the bill. In view of what had gone before, it is hardly to be supposed that Mr. Clayton, or the House, was now disingenuously reversing the decision to exclude appellate courts from the jury trial requirement. Obviously, the addition was meant to accomplish no such important alteration.

The proper explanation is simple. The Judiciary Committee merely wished to include the trial courts in the District of Columbia, which would *not* have been covered by the language "any district court of

the United States" for two reasons: (1) in 1914, the jurisdiction now exercised by the United States District Court for the District of Columbia was vested in a tribunal called the Supreme Court of the District of Columbia;[19] and (2) there were then, as now, inferior courts in the District of Columbia which were subject nonetheless to congressional legislative jurisdiction, *i.e.* the police and municipal courts.[20]

The subsequent course of the Clayton Act bill shows that no great change had been worked by this amendment. When the amended bill reached the Senate, Senator Sterling of South Dakota, an opponent, argued that most contempt cases would "arise not in the law court where a jury may be more readily found, or where there is a jury in attendance upon the court, but * * * in equity cases where there is no jury * * *". Senator Chilton of West Virginia, a member of the Judiciary Committee, replied (51 Cong. Rec. 14374):

> The Senator from South Dakota is clearly mistaken, because this provision refers to Federal courts, and all the Federal district courts have juries.

See also the statement of Senator Jones (51 Cong. Rec. 14414):

> * * * before any person can be tried by a jury upon the charge of having violated a decree or

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[19] In 1936—twenty-two years later—the name was changed to the District Court of the United States for the District of Columbia, and subsequently to its present name (the United States District Court for the District of Columbia). Historical and Revision notes following 28 U.S.C. 44.

[20] These courts subsequently were consolidated into the Municipal Court for the District of Columbia, now called the District of Columbia Court of General Sessions.

order of the court, the act with which he is charged as being in contempt must be, in and of itself, a crime and contrary to some law of the United States or the law of some State. *This applies also only to orders of the district courts; contempts of orders of all other courts must be had as now.* [Emphasis added].

4. *The injunction which defendants are charged with violating was entered by the court of appeals pursuant to its appellate jurisdiction.*

Judge Bell suggested below that the court of appeals "must abide [by] the statutes applicable to the District Court" when it acts "as a District Court" (C. 165). The fact is, however, that the court below was not acting as a district court, either in issuing the order of September 25, 1962, or in hearing the contempt proceedings. The court was acting as a court of appeals, exercising ancillary jurisdiction to effectuate its own judgment, entered in an appeal from a district court order. The power of an appellate court to conduct proceedings ancillary to the main cause in order to protect and effectuate its judgment or decree is well settled. *Toledo Scale Co.* v. *Computing Scale Co.*, 281 Fed. 488 (C.A. 7), affirmed, 261 U.S. 399; *Sawyer* v. *Dollar*, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 806; *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527. It makes no difference that the lower court could have achieved the same result by conducting its own ancillary proceedings. *Merrimack River Savings Bank* v. *Clay Center, supra; Sawyer* v. *Dollar, supra.*

The United States did not purposively by-pass the district court, nor did the court of appeals usurp the jurisdiction of the lower court. The history, fully recited in the Statement, *supra*, amply demonstrates the unusual circumstances which compelled resort to the processes of the appellate court. For a time, the district court was rendered powerless by the series of stays issued by Judge Cameron. Later, the district court declined to enter appropriate decrees and the operative orders were issued, in effect, on appeal, after the district court had denied relief. In the circumstances, unless the judicial process was to founder and justice go defeated, the court of appeals had to act. Its intervention, after long forbearance, was, we submit, our view, wholly proper.[21]

B. DEFENDANTS HAVE NO STATUTORY RIGHT TO TRIAL BY JURY BECAUSE THE CHARGES ARE OF WILFUL DISOBEDIENCE OF AN ORDER ENTERED IN AN ACTION BROUGHT AND PROSECUTED IN THE NAME OF THE UNITED STATES

There is an additional and independent ground for rejecting the defendants' statutory argument. As we have already noted, both Section 402 and Section 3691 of the Criminal Code expressly exempt from the jury trial requirement "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf

[21] Even if it were debatable whether the court of appeals should have itself issued the restraining order alleged to have been violated, the order, once issued, could not be disregarded with impunity. *United States* v. *United Mine Workers*, 330 U.S. 258.

of, the United States." The instant case falls within that exception."

1. *The injunction violated by defendants was entered in an ancillary action brought and prosecuted by the United States asserting its independent sovereign interest in preserving the integrity of the judicial process.*

By its order of September 18, 1962 (C. 5), the court of appeals directed "that the United States be

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"The provisions of Section 402 and 3691 exempting contempts of orders entered in actions brought by the United States have been broadly construed in favor of the United States so as not to require trial by jury where the case fairly can be said to be within the scope of the exemption. Cf. *United States* v. *Grand Flower & Ornament Co.*, 47 F. Supp. 256, 257 (S.D. N.Y.), where the court held that no jury trial was required in a contempt proceeding based on violation of a consent decree in a Fair Labor Standards Act proceeding brought by the Administrator of the Wage and Hour Division because the latter proceeding was prosecuted "on behalf of the United States." Accord, *Walling* v. *Men's Hats*, 61 F. Supp. 803, 804 (D. Md.). See also *Swepston* v. *United States*, 251 Fed. 205, 210 (C.A. 6), where the court held the exception applicable to a contempt proceeding based upon violation of an order of commitment entered in a criminal prosecution brought by the United States. Conversely, the provisions of 402 and 3691 requiring jury trial are "of narrow scope" and "carefully limited to the cases of contempt specifically defined." *Michaelson* v. *United States*, 266 U.S. 42, 66; *United States* v. *Goldman*, 277 U.S. 229, 238; *Russell* v. *United States*, 86 F. 2d 389, 393 (C.A. 8); *Donato* v. *United States*, 48 F. 2d 142, 143 (C.A. 3); *McGibbony* v. *Lancaster*, 286 Fed. 129, 131 (C.A. 5); Cf. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 471-2: *National Labor Relations Board* v. *Red Arrow Freight Lines*, 193 F. 2d 979 (C.A. 5). Compare the remarks of Representative Clayton, who said of the Clayton contempt bill on the floor of the House: "This bill is narrow in its scope." 48 Cong. Rec. 2777. Indeed, the issue in the *Michaelson* case was whether Congress constitutionally could enact the jury trial provisions of the Clayton Act, in view of the inherent nature of the contempt power.

designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before this Court * * * with the right to submit pleadings, evidence, arguments and briefs *and to initiate such further proceedings, including proceedings for injunctive relief* and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States" (emphasis added). Pursuant to this order, the United States, on September 24, 1962, filed an action in the court of appeals (ancillary to the case of *Meredith* v. *Fair*), subtitled *"United States* v. *Mississippi, et al."*, and sought a temporary restraining order. It was in this action that the court of appeals, on September 25, 1962, issued the temporary restraining order which the defendants are charged with willfully disobeying (C. 31–34). The sole party moving for the issuance of the temporary restraining order was the United States.

The papers filed by the United States on September 24, 1962, were not a mere brief in support of an action brought by someone else. To be sure, the action entitled *"United States* v. *Mississippi, et al."* was given the same number as the action entitled *"Meredith* v. *Fair,"* and both captions appeared at the head of the temporary restraining order. This fact, however, merely emphasizes the ancillary nature of the action. It does not detract from its status as an action.

The critical fact is that in instituting and prosecuting those proceedings the United States was asserting

an interest of its own separate and distinct from that of the plaintiff in the original action. The interest of the United States was the sovereign's independent concern for preserving the integrity of its courts and vindicating their authority. The special character of the government's concern was noted in the order designating the United States a party and was repeatedly emphasized throughout its participation.[22] The

[22] The President's report to the nation on September 30, 1962, shortly after Meredith's entry onto the University campus, makes clear the role of the United States as protector of the judicial process rather than protagonist in the underlying suit (Public Papers of the President, 1962, pp. 726-727):

"* * * [O]ur Nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny. The law which we obey includes the final rulings of the courts, as well as the enactments of our legislative bodies. Even among law-abiding men few laws are universally loved, but they are uniformly respected and not resisted.

"Americans are free, in short, to disagree with the law but not to disobey it. For in a government of laws and not of men, no man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law. If this country should ever reach the point where any man or group of men by force or threat of force could long defy the commands of our court and our Constitution, then no law would stand free from doubt, no judge would be sure of his writ, and no citizen would be safe from his neighbors.

"In this case in which the United States Government was not until recently involved, Mr. Meredith brought a private suit in Federal court against those who were excluding him from the University. A series of Federal courts all the way to the Supreme Court repeatedly ordered Mr. Meredith's admission to the University. When those orders were defied, and those who sought to implement them threatened with arrest and violence, the United States Court of Appeals * * * made clear the fact that the enforcement of its order had be-

designation of the United States as "amicus curiae" in the order of September 18, 1962, cannot obscure this essential fact. The substance of the order, not the name, is controlling where the order spells out the rights and authority the party is given. Here, the order explicitly conferred upon the United States all the privileges and authority of a party including the right to initiate proceedings for injunctive relief (C. 5). The United States was designated in the same manner in *Faubus* v. *United States*, 254 F. 2d 797 (C.A. 8), certiorari denied, 358 U.S. 829, where, to prevent obstruction of school desegregation decrees in Little Rock, Arkansas, the United States obtained an injunction against new defendants pursuant to ancillary jurisdiction. The court said (254 F. 2d at 805):

> In our opinion, the status of the Attorney General and the United States Attorney was something more than that of mere amici curiae in private litigation. They were acting under the authority and direction of the court to take such action as was necessary to prevent its

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come an obligation of the United States Government. Even though this Government had not originally been a party to the case, my responsibility as President was therefore inescapable. I accept it. My obligation under the Constitution and the statutes of the United States was and is to implement the orders of the court with whatever means are necessary, and with as little force and civil disorder as the circumstances permit.

"It was for this reason that I federalized the Mississippi National Guard as the most appropriate instrument, should any be needed, to preserve law and order while United States marshals carried out the orders of the court and prepared to back them up with whatever other civil or military enforcement might have been required."

> orders and judgments from being frustrated and to represent the public interest in the due administration of justice.

See also, *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 866 n. 9 (E.D. La.), affirmed *sub nom. New Orleans* v. *Bush*, 366 U.S. 212; *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875–879 (E.D. La.), affirmed sub nom. *Denny* v. *Bush*, 367 U.S. 908; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515; Cf. *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 519–21, 537 (C.A. 3).

The standing of the United States to assert its independent sovereign interest in such a context is also beyond dispute. *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875–879 (E.D. La.), affirmed *sub nom. Denny* v. *Bush*, 367 U.S. 908. Indeed, in this very litigation, this Court has recognized the position of the United States as a party, first by granting a motion of the United States to be named a party respondent on a petition for certiorari and then by declining to review not only the order of the court of appeals designating the United States *amicus curiae* but also the restraining order of September 25, 1962, the alleged violation of which gave rise to the charges of contempt. 372 U.S. 916.

It may be argued that we reach the conclusion that the order of September 25, 1962, was entered in an action "brought or prosecuted by the United States" only by ignoring the formal rules of procedure. Thus, Judge Gewin asserted that the United States should have applied for leave to intervene in the district court, and apparently challenges the validity of

the order constituting the United States an *amicus curiae* with power to initiate further proceedings (C. 136–137). See also the opinions of Judge Bell (C. 158, n. 5) and Judge Cameron (C. 87). This contention—urged as error in the petition for certiorari in *Mississippi* v. *Meredith*, No. 661, O.T. 1962, certiorari denied, 372 U.S. 916—ignores the cases cited above in which the United States has participated in similar fashion and in which such participation has been sustained over similar objections. It also disregards the fact that the Federal Rules of Civil Procedure do not apply to the courts of appeals. Rule 1, Fed. R. Civ. P.; *Hines* v. *Royal Indemnity Co.*, 253 F. 2d 111 (C.A. 6); *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 120 F. 2d 126 (C.A. 1); *Armour & Co.* v. *Kloeb*, 109 F. 2d 72 (C.A. 6). Cf. *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9. The court of appeals did not act until it had ascertained that the district court would not admit the United States as a party (C. 5). The pressure of time compelled resort to the extraordinary processes available under the "all writs" statute (28 U.S.C. 1651) unless the mandate of the court of appeals was to be set at naught for another academic term. The defendants had the opportunity to challenge the propriety of the government's participation in the case; they repeatedly did so, and the court of appeals rejected their contentions. Every procedural right was thereby preserved.

It is equally irrelevant that the papers filed by the United States were given the same number as *Meredith* v. *Fair* and the restraining order bore that caption as well as the caption *United States* v. *Missis-*

sippi. These circumstances merely indicate the ancillary nature of the action instituted by the United States. Though ancillary, it was, as we have shown, brought by the United States in its own right and subject to its separate direction and control. These essential characteristics, not procedural niceties, determine whether an order was "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States," within the meaning of 18 U.S.C. 402 and 3691.

2. *The statutory exception extends to any decree obtained by the United States in an action brought or prosecuted to assert a separate sovereign interest.*

The provisions of the Clayton Act requiring trial by jury where the alleged contempt would also constitute a crime were aimed at the "blanket midnight injunctions" obtained by employers in labor disputes. See 48 Cong. Rec. 8779, 8785 (remarks of Rep. Clayton); 48 Cong. Rec. 8780 (remarks of Rep. Floyd). Congress drew a sharp distinction between private litigation, where it required a jury, and proceedings to vindicate a public right, which it excepted. The reasons which influenced Congress are apparent. Where the United States is proceeding to enforce a public right, the defendant is afforded the safeguard of an independent and impartial determination by public officials before the proceeding is instituted—a safeguard not available in private litigation. In that situation, it was thought, the United States should have the full range of sanctions for vindicating judicial orders unmitigated by a jury's powers of dispensation.

The very language of 18 U.S.C. 402 and 3691 suggests that it is concerned with the substance of the United States' prosecution of a public right rather than procedural niceties. The exception covers an order in any "suit *or* action." It may be one "brought *or* prosecuted" by the United States, a disjunctive that strongly implies that the United States need not have been a party from the beginning. And the exception is applicable whether the proceeding be "in the name of, *or* on behalf of, the United States." Congress was seeking broadly to except the vindication of a public interest.

What is suggested by the words is demonstrated by the legislative history. The exception in favor of the United States originated with a suggestion of the Attorney General that jury trial would handicap the courts in enforcing decrees dissolving combinations in restraint of trade.[24] The language of the exception, however, is not limited to antitrust cases, and the legislative history shows that its broad scope was intentional. The following colloquy between Representative Longworth and Representative Clayton is instructive (48 Cong. Rec. 8779):

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[24] When the Clayton contempt bill was first being considered in the House, Representative Clayton stated (48 Cong. Rec. 8778, 62nd Cong., 2d Sess.):

"The next objection that was made to it was that it would probably detract from the powers of the courts to enforce their decrees of dissolution of combinations denounced by the antitrust law. I violate no confidence when I say that that was the criticism of the chief legal officer of the present administration, Attorney General Wickersham. We have met that objection by providing in this bill that it shall not apply in any case where the United States is the party complainant. * * *"

> Mr. LONGWORTH. Suppose a case like this, where there was a strike on a railroad engaged in interstate commerce, and the United States courts should enjoin interference with the free passage of trains, say, in and out of a station?
>
> Mr. CLAYTON. The bill on its face says that in any case where the United States is the complainant it has no application. * * *

See also *Id.*, p. 8785 (remarks of Representative Clayton); *Id.*, p. 8780 and *Id.*, Appendix, p. 314 (remarks of Representatives Floyd and Davis, members of the House Judiciary Committee).

More significantly, Senator Walsh of the Senate Judiciary Committee, Senate spokesman for H.R. 15657, 63rd Cong., 2d Sess. (the bill which became the Clayton Act) stated on the floor of the Senate (51 Cong. Rec. 14377):

> *There is a proper distinction between a suit brought by a private individual or a private corporation for the vindication and establishment of a mere private right and a suit brought by the Government, representing the whole body of the people, to safeguard and protect a public right.* Section 22 gives expression to that difference, which everybody will recognize. * * * [Emphasis added.]

Similarly, Representative Clayton said of the Clayton contempt bill in the previous Congress (48 Cong. Rec. 8779):

> It [the bill] does not intend to detract and does not detract one iota from the power, the majesty, and the dignity of the United States. *The Government of the United States has*

> *under this bill every power,* even when it becomes a law, *to enforce its judgments and its demands that it has now* [emphasis added]."

We conclude that the United States was in every meaningful sense the "suitor" prosecuting the proceedings which led to the issuance of the restraining order here involved. It is irrelevant that the government intervened in the pending litigation and invoked the court's ancillary jurisdiction instead of initiating a wholly new proceeding. Cf. *United States* v. *Louisiana,* reported with *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (E.D. La.), stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *United States* v. *Wallace,* decided June 5, 1963 (N.D. Ala.). The crucial consideration is that the order which defendants are charged with violating was entered on the independent application of the United States, acting to protect its own rights in assuring the administration of justice and vindicating the authority of its courts. The rationale of the rule is that when "the rights * * * of the United States" are at stake, the special statutory restrictions on the contempt power are out of place. *Hill* v. *United States ex. Rel. Weiner,* 300 U.S. 105, 109;[*] *United States* v. *Goldman,* 277 U.S. 229. As one district judge

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[*] Although there were statements in debate to the effect that no jury trial is required where the United States is a "party" (*e.g.*, 48 Cong. Rec. 8780, 8785; 51 Cong. Rec. 9669, 9672, 14413, 15945, 15946), this characterization merely was a shorthand way of describing the exception, for normally the United States is the original plaintiff. The precise question involved here did not arise in the course of the legislatve history.

[*] In *Hill,* the Court held that the provision of § 22 of the Clayton Act fixing a term of six months as the maximum pen-

summed it up with particular reference to the jury trial requirement: " * * * the lawmakers may have been quite willing to experiment with juries in certain kinds of contempt cases growing out of private disputes * * * and wholly unwilling to make a similar experiment in cases involving the rights of the government." "It is beyond question wise, politic, salutary, that the government's ancient rights as a litigant be not impaired." *United States* v. *Taliaferro*, 290 Fed. 214, 222–223 (W.D. Va.), affirmed, 290 Fed. 906 (C.A. 4).

II

DEFENDANTS HAVE NO CONSTITUTIONAL RIGHT TO JURY TRIAL

1. In *Green* v. *United States*, 356 U.S. 165—decided in 1958—this Court exhaustively considered the question of whether a person charged with criminal contempt for violating a court order has a constitutional right to trial by jury. The petitioners in *Green* were convicted of violating the Smith Act [7] and sentenced to pay a fine and to five years' imprisonment. This Court affirmed the convictions. *Dennis* v. *United*

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alty of imprisonment for contempt, was limited to prosecutions arising out of cases instituted by private litigants and was inapplicable to contempts arising out of suits brought or prosecuted in the name of, or in behalf of, the United States. The Court further held that the due process clause of the Fifth Amendment did not preclude Congress from prescribing a heavier penalty for an offense involving "*the rights* and property *of the United States* than for a like offense involving the rights or property of a private person," 300 U.S. 105, 109 (emphasis added).

[7] 18 U.S.C. 371, 2385.

States, 341 U.S. 494. Following affirmance, the district court signed an order requiring the petitioners, who had been enlarged on bail, to surrender for the the execution of their sentences. The United States instituted criminal contempt proceedings against the petitioners in the district court for willful disobedience of the surrender order. Pursuant to Rule 42(b), Fed. R. Crim. P., these proceedings were tried to the court without a jury. Each petitioner was convicted and sentenced to three years, and the convictions were affirmed by the Court of Appeals for the Second Circuit. This Court granted certiorari and affirmed.

Among the grounds argued for reversal in *Green* was the contention that proceedings for criminal contempt, if they could result in a prison sentence of more than one year, must be based on grand jury indictment under the clause of the Fifth Amendment which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *." The Court, however, stated that "this assertion cannot be considered in isolation from the general status of contempt under the Constitution, whether subject to 'infamous' punishment or not. The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." 356 U.S. at 183.

In *Green*, this Court listed its prior major decisions discussing the relationship between criminal contempts and jury trial and concluding or assuming that criminal contempts are not subject to jury trial (*ibid*). *In re Savin*, 131 U.S. 267, 278; *Eilenbecker* v. *District Court of Plymouth County*, 134 U.S. 31, 39; *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 489; *In re Debs*, 158 U.S. 564, 594–596; *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 336–337; *Gompers* v. *United States*, 233 U.S. 604, 610–611; *Ex parte Hudgings*, 249 U.S. 378, 383; *Michaelson* v. *United States*, 266 U.S. 42, 67; *United States* v. *United Mine Workers*, 330 U.S. 258, 298. Several of these cases, the Court pointed out, involved review of contempt convictions arising out of disobedience to court orders. See *In re Debs*, *supra*; *Gompers* v. *United States*, *supra*, and *United States* v. *United Mine Workers*, *supra*.[22] The Court declared that

[22] Mr. Justice Frankfurter, concurring, cited forty cases in this Court, "not to mention the vast mass of decisions in the lower federal courts," in which the power to punish summarily (without the intervention of a jury), had been accepted without question (356 U.S. at 190, 191). *Ex parte Kearney*, 7 Wheat. 38; *In re Chiles*, 22 Wall. 157; *Ex parte Terry*, 128 U.S. 289; *In re Savin*, 131 U.S. 267; *In re Cuddy*, 131 U.S. 280; *In re Swan*, 150 U.S. 637; *In re Debs*, 158 U.S. 564; *Brown* v. *Walker*, 161 U.S. 591; *In re Lennon*, 166 U.S. 548; *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324; *Nelson* v. *United States*, 201 U.S. 92; *United States* v. *Shipp*, 203 U.S. 563, 214 U.S. 386; *Ex parte Young*, 209 U.S. 123; *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402; *Blair* v. *United States*, 250 U.S. 273; *Craig* v. *Hecht*, 263 U.S. 255; *Brown* v. *United States*, 276 U.S. 134; *Sinclair* v. *United States*, 279 U.S. 749; *Blackmer* v. *United States*, 284 U.S. 421; *Clark* v. *United States*, 289 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Rogers* v. *United States*,

"[i]t would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are 'infamous crimes' under the Fifth Amendment although they are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of Art. III, § 2 and the Sixth Amendment.'" [9] 356 U.S. at 184–185. Reviewing English and American historical practice, the Court

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340 U.S. 367; *Sacher* v. *United States*, 343 U.S. 1; *Nilva* v. *United States*, 352 U.S. 385; *Yates* v. *United States*, 355 U.S. 66; *Ex parte Robinson*, 19 Wall. 505; *In re Burrus*, 136 U.S. 586; *Wilson* v. *North Carolina*, 169 U.S. 586; *In re Watts*, 190 U.S. 1; *Baglin* v. *Cusenier Co.*, 221 U.S. 580; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *Ex parte Hudgings*, 249 U.S. 378; *Cooke* v. *United States*, 267 U.S. 517; *Nye* v. *United States*, 313 U.S. 33; *Pendergast* v. *United States*, 317 U.S. 412; *United States* v. *White*, 322 U.S. 694; *In re Michael*, 326 U.S. 224; *Blau* v. *United States*, 340 U.S. 332; *Hoffman* v. *United States*, 341 U.S. 479; *Cammer* v. *United States*, 350 U.S. 399. Mr. Justice Frankfurter called the roll of 53 Justices of this Court who had sustained the exercise of the power to punish summarily, *i.e.*, without the intervention of a jury, for contempt, including Chief Justices Marshall, Waite, White, Hughes, and Stone, and Justices Story, Holmes, Brandeis and Cardozo.

Decisions of this Court subsequent to *Green* also assume that no constitutional right to trial by jury exists in criminal contempt cases. See *Brown* v. *United States*, 356 U.S. 148; *Yates* v. *United States*, 356 U.S. 363; *Brown* v. *United States*, 359 U.S. 41; *Levine* v. *United States*, 362 U.S. 610; *Reina* v. *United States*, 364 U.S. 507; *Piemonte* v. *United States*, 367 U.S. 556.

[9] Article III, § 2, provides in pertinent part that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *." The Sixth Amendment provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *."

concluded that "[t]he principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions." *Id.* at 187.

2. In light of this Court's recent ruling in *Green*, we shall not reargue the constitutional question at length. In this connection, we respectfully refer the Court to the government's brief in *Green* v. *United States*, Oct. Term, 1957, No. 100, particularly to the historical materials there collected (pp. 63–76). We would, however, add several observations, which emphasize, in our view, the importance of the principles confirmed in *Green*.

The constitutional guarantee of trial by jury, when applicable, includes the requirement that the verdict be unanimous, *Maxwell* v. *Dow*, 176 U.S. 581, 586; *Andres* v. *United States*, 333 U.S. 740. Thus, if a jury trial were required in order to punish disobedience of a judicial writ or decree, a single juror lacking in sympathy with the underlying order could render it ineffective.[30] The danger of such a result is particularly apparent in those instances in which the

[30] Should this occur, the court would have no recourse. To be sure, civil contempt proceedings may be available in certain instances, *e.g.*, where the court's order affirmatively requires the doing of an act, or where the injury accomplished by the violation of a negative restraining order can be undone. But civil contempt simply gives the defendant, on pain of punishment, another chance to comply with the court's order. There are many cases, moreover, in which the violation of a restraining order would cause irreparable injury which could not be remedied by future compliance or by any other act, and where vindication of the court's authority depends entirely upon the institution of criminal contempt proceedings.

issues resolved by the court's order command strong public feeling.

While the Constitution is silent on the subject of contempt, and while, so far as we have been able to ascertain, the subject was not raised at the constitutional convention, at the ratifying conventions of the States, or at the time of the adoption and ratification of the Bill of Rights, there are certainly persuasive indications that the framers of the Constitution wished to insulate the functions of the federal judiciary in safeguarding constitutional and other federal rights from the passion of factions within the community. This was one of the principal purposes of Article III, Section 1, of the Constitution, which provides that federal judges are to hold their offices during good behavior. Speaking of this Section in The Federalist No. 78, Hamilton wrote:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which * * * have a tendency * * * to occasion * * * serious oppression of the minor party in the community. * * * [I]t is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.
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> * * * * *

> The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; * * * *Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts;* as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. [Emphasis added.]

The independence of the federal courts, so carefully preserved by such constitutional requirements as life tenure and the ban on diminution of judicial compensation, would be seriously undermined if their orders could be nullified by an unsympathetic jury. The present case forcefully illustrates the point. If the elected leaders of a State are capable of treating federal court orders with the disrespect which this record reflects, what prospect is there that those whom they lead will disregard their example, or will be more independent or more courageous?[21]

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[21] On the other hand, the problem of protecting minority rights from encroachment by a majority is not typically presented in the criminal law. The basic function of the criminal law is to protect the majority against the depredations of the few. Although there may be circumstances in which a jury disagrees with the philosophy of a criminal statute and acquits for that reason, we are normally willing to pay the price for this behavior since the acquittal presumably reflects a community consensus that the law is unjust and that the defendant should not be punished. Such nullification, however, does not typically involve the abrogation of a constitutional right. Civil rights statutes, prohibiting governmental officials from denying constitutional rights, see 18 U.S.C. 242; 243, are exceptions. The overwhelming majority of criminal statutes are directed at private conduct.

The authority of this Court, as well as other federal courts, rests upon effective use of the contempt power to vindicate the court's mandate. This Court customarily issues mandamus and other orders under the all-writs statute (28 U.S.C. 1651) and various kinds of stay or injunctive orders for the purpose of preserving its jurisdiction pending disposition of a case.[32] For example, the Court, or one of its Justices, not infrequently stays the execution of a prisoner by state prison authorities while the Court is considering the prisoner's case. Violation of such an order is punishable by contempt. Thus, in *United States* v. *Shipp*, 203 U.S. 563, after a stay of execution had been issued by this Court, a sheriff was charged with delivering the prisoner—a Negro accused of raping a white woman—into the hands of a local mob which lynched him. This Court then instituted contempt proceedings, and took testimony through a commissioner whom it appointed specially (214 U.S. 386, 471). On the basis of the written record of this testimony, the Court, after argument, adjudged the defendants guilty (214 U.S. 386) and sentenced several of them to imprisonment (215 U.S. 580). If the defendants in the *Shipp* case had had a constitutional right to trial by jury, they would have been tried in Tennessee, where the lynching occurred.[33] One can only speculate

[32] Mr. Justice Black issued an injunction in this very case when he vacated the stay orders entered by Judge Cameron (C. 4).

[33] Art. III, Section 2, Clause 3, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; *and such Trial shall be held in the State where the said Crimes shall have been committed*" (emphasis added). The Sixth

whether in such circumstances this Court's authority would have been vindicated.

More than a century ago, moreover, this Court observed that the conduct of a trial by jury in this Court, even in the limited class of cases involving original actions at law against citizens of the United States, "embarrass[es] and retard[s] the business of this [C]ourt." *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 588. The point has even greater force today, when the Court's caseload has increased greatly. The result of overruling the *Green* case would be to enhance the prospect of a lengthy jury trial lasting days and possibly weeks, interrupting the consideration of the Court's vital business. As the *Shipp* case reflects, orders of appellate courts, like orders of trial courts, are at times disobeyed.[34] The *Shipp* case is

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Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed*" (emphasis added).

[34] Statements in the opinions below to the effect that this is the first case in which criminal contempt proceedings have been instituted in a court of appeals for violation of a court of appeals order (C. 45, 61) are incorrect. See, *e.g.*, *In re Alexander McKenzie*, 180 U.S. 536, 538; *Tornanses* v. *Melsing*, 106 Fed. 775, 790 (C.C.A. 9); *In re Whitney & Company*, 273 F. 2d 211 (C.A. 9); *In re Dolcin Corp.*, 247 F. 2d 524 (C.A. D.C.), certiorari denied, 353 U.S. 988; *In re Door*, 195 F. 2d 766, 770 (C.A. D.C.); *National Labor Relations Board* v. *Red Arrow Freight Lines*, 193 F. 2d 979 (C.A. 5); *Douds* v. *Local 1250*, 173 F. 2d 764 (C.A. 2); *Federal Trade Commission* v. *Hoboken White Lead & Color Works, Inc.*, 67 F. 2d 551 (C.A. 2). See also the following cases not reported in the federal reporter system: *In re Edwin G. Axel*, 6 Stat. & Ct. Dec. of F.T.C. 816 (C.A. 3); *In re Trade Union Courier Publishing Corp., et al.*, 6 Stat. & Ct. Dec. of F.T.C. 750 (C.A. 3); *In re P. Lorillard Company*, 6 Stat. & Ct. Dec. of F.T.C. 490 (C.A. 4); *Federal Trade Com*

but one instance in which an order of this Court has been violated. Indeed, the order of Mr. Justice Black was flouted in this very case. See also, *e.g.*, *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 12, where an Indian named Corn Tassell was executed by Georgia authorities in defiance of a writ of error allowed by the Chief Justice of this Court.[35]

Finally, we emphasize that in trying a defendant for contempt by disobedience of court order, "[t]he court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case." *United States* v. *Shipp*, 203 U.S. 563, 574 (Mr. Justice Holmes, speaking for the Court).[36] A defend-

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mission v. *Pacific States Paper Trade Assn.*, 2 Stat. & Ct Dec of F.T.C. 402 (C.A. 9); *In the matter of Louis Leavitt*, 2 Stat. & Ct. Dec. of F.T.C. 334 (C.A. 2); *Louis Leavitt* v. *Federal Trade Commission*, 1 Stat. & Ct. Dec. of F.T.C. 582 (C.A. 2). All of these cases were tried without a jury.

[35] The *Cherokee Nation* case is discussed in 2 Warren, *The Supreme Court in United States History*, pp. 189–239.

[36] The present contempt does not involve "disrespect to or criticism of a judge" within the meaning of Rule 42(b) of the Rules of Criminal Procedure; nor does it arise out of a conflict in which the court became "personally embroiled" with the contemnor, as in *Offutt* v. *United States*, 348 U.S. 11, 17. See, also, the dissenting opinions of Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas in *Sacher* v. *United States*, 343 U.S. 1, 14–17, 23–42, 89. On the contrary, here the defendants are charged with disobedience of a written order involving no confrontation between court and contemnor. Accordingly, the traditional grounds for disqualifying the judges whose order was allegedly violated are inapplicable. Nor does the participation of the judges in the civil contempt proceedings against these defendants require their recusation, as one of the opinions below suggests (C. 123–127). We think it unnecessary to argue the ability of the court to distinguish the

ant in such a case receives the full protection of due process." He is presumed to be innocent, his guilt must be proved beyond a reasonable doubt, and he cannot be compelled to testify against himself. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444; *Michaelson* v. *United States*, 266 U.S. 42, 66. He receives notice of and has a reasonable opportunity to meet the charges against him, and has the right to counsel and the right to present his own witnesses and

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differing elements involved in the criminal contempt proceedings and to approach the present case with a fresh mind, free of its findings in the prior civil contempt proceedings. In any event, the qualification of the judges cannot justify the transfer of the contempt hearing to the district court, which some of the opinions below seem to suggest (see C. 95–97, 123–127, 144–147, 164–167). The court whose order is involved must itself vindicate its authority. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 326; *In re Debs*, 158 U.S. 564, 594–596; *Ex Parte Tillinghast*, 4 Pet. 108. If need be, the chief judge of the court of appeals may assign district judges of the circuit to sit on the court of appeals, 28 U.S.C. 292(a), or he may request the Chief Justice to assign circuit or district judges from other circuits to compose the court. 28 U.S.C. 291(a), 292(c).

" In *Hawaii* v. *Mankichi*, 190 U.S. 197, 218, the Court held that the right to jury trial is not "fundamental" in nature and hence did not extend to the territories of the United States. Nor does it extend to state prosecutions through the due process clause of the Fourteenth Amendment. *Hurtado* v. *California*, 110 U.S. 516. There is no right to trial by jury in a proceeding to deport an alien, *Turner* v. *Williams*, 194 U.S. 279; in a disbarment proceeding of an attorney, *Ex parte Wall*, 107 U.S. 265; in the extradition of an alien, *Ex parte La Mantia*, 206 Fed. 330 (S.D. N.Y.); in the court-martial of persons under military jurisdiction, *Kahn* v. *Anderson*, 255 U.S. 1; in cases of espionage and sabotage by enemies of the United States, *Ex parte Quirin*, 317 U.S. 1; in suits by the Government to recover a fine for violation of statutory requirements, *U.S.* v. *Zucker*, 161 U.S. 475; in criminal prosecutions for petty offenses, *District of Columbia* v. *Clawans*, 300 U.S. 617;

or to cross-examine others, *Cooke* v. *United States*, 267 U.S. 517, 537.

Throughout Anglo-American history contempt proceedings designed to impose sanctions for violation of the process or orders of the courts have been regarded as *sui generis* and hence not subject to all of the requirements attendant upon the conduct of ordinary criminal proceedings. More particularly, it has been thought essential to the dignity and to the effective functioning of the judiciary that the courts have power to vindicate directly their lawful decrees and that such enforcement should not be subject to the hazard that individual jurors might be unsympathetic. The reasons behind the original understanding have not changed. There is accordingly no warrant, now, to alter the traditional law of contempt. Certainly, the high office of the defendants in this case gives no occasion to fashion a special rule. "No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U.S. 196, 220.

CONCLUSION

It is respectfully submitted that the question certified by the court of appeals should be answered in the negative.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
HAROLD H. GREENE,
DAVID RUBIN,
Attorneys.
LEON JAWORSKI,
W. H. VAUGHAN, JR.,
Special Assistants to the Attorney General.

AUGUST 1963.

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, § 2., Par. 3 provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its dis-

erction, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 402 provides:

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the

United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U.S.C. 3691 provides:

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

Rule 42(b) of the Federal Rules of Criminal Procedure provides:

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order

of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Section 20 through 24 of the Clayton Act provided (38 Stat. 730, 738–740):

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dis-

pute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be

not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided,* That in any case the court or a judge

thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

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LIBRARY
SUPREME COURT, U. S.

MOTION FILED AUG 29 1963

IN THE

Supreme Court of the United States

October Term 1963

No. 107

UNITED STATES OF AMERICA,

v.

ROSS R. BARNETT, *et al.*

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

OSMOND K. FRAENKEL,
NORMAN DORSEN,
ALFRED LAWRENCE TOOMBS,
% American Civil Liberties Union,
156 Fifth Avenue,
New York 10, N. Y.
Attorneys for the American Civil Liberties Union, Amicus Curiae.

MELVIN L. WULF,
of Counsel.

IN THE

Supreme Court of the United States

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No. 107

UNITED STATES OF AMERICA,

v.

ROSS R. BARNETT, *et al.*

MOTION FOR LEAVE TO FILE A BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves for leave to file a brief as *amicus curiae* in support of the defendants in this case. The consent of the Solicitor General, for the United States of America, has been obtained, and has been filed with the Clerk. The consent of the Attorney General of Mississippi, for Ross R. Barnett, et al., was requested, but no response to this request has been received.

For many years, the American Civil Liberties Union has been concerned with helping to clarify the concept of due process of law. The Union believes that its brief in this case can assist the Court in determining the requirements of due process of law in the area of criminal con-

tempts. The interest of the Union is more fully set forth in the accompanying brief.

Respectfully submitted,

Osmond K. Fraenkel,
Norman Dorsen,
Alfred Lawrence Toombs,
% American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York,

Attorneys for the American Civil Liberties Union, Amicus Curiae.

Melvin L. Wulf,
of Counsel.

August 1963.

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IN THE

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

Interest of *Amicus*

The American Civil Liberties Union is a forty-three year old, non-partisan, private organization engaged solely in defending and extending the Bill of Rights, with emphasis upon free speech, due process of law and the equal protection of the laws. Our concern in this case is with due process of law in the area of criminal contempts.

The American Civil Liberties Union believes that, "The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law." *Green* v. *United States*, 356 U. S. 165, 193 (1958) (dissenting opinion). Summary procedure is not a "necessity"—as is sometimes claimed—to preserve the authority of the court. And the doctrine of *stare decisis* certainly does not operate here with sufficient force to justify continuation of an unwarranted breach of the Bill of Rights. In these circumstances, the Court should rule

that "[i]n the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state." *Green* v. *United States*, *supra* at 218 (dissenting opinion).

ARGUMENT

I. A jury trial is an indispensable component of a fair trial; this is especially so in criminal contempt actions.

The jury system has long been recognized as one of the fundamental procedural safeguards of our system of jurisprudence. Its history dates back at least to the Magna Charta, where it was provided:

> "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

Blackstone attested to its vital place in the common law with these famous words:

> "[T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! * * * [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, *Commentaries*, *379.

The importance of trial by jury in our system was recognized even before the Revolution. The Declaration of Rights issued in 1765 by nine of the thirteen original Colonies stated:

> "That trial by jury, is the inherent and invaluable right of every British subject of these colonies." 43 Harvard Classics 147, 148.

One of the enumerated grievances contained in the Declaration of Independence was that laws had been adopted,

> "For depriving us in many cases, of the benefits of Trial by Jury."

The great regard which the draftsmen of the Constitution attached to the right to jury trial in criminal cases is evidenced by the fact that it is twice mentioned there, both in Article III, Section 2 and in the Sixth Amendment. Hamilton, urging the adoption of the Constitution, described jury trial as the "very palladium of free government." *The Federalist*, No. 83. Later, Justice Story noted that,

> "When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." Story, *Constituition*, §1779 (4th ed. 1873).

The importance of jury trial in our system of justice derives from the fact that in a very real sense the tribunal of last resort in questions of fact is the people themselves. De Tocqueville expressed this fact with his usual insight:

> "The institution of the jury * * * places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. * * * He who punishes the criminal is * * * the real master of society. * * * All the soverigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions,

have destroyed or enfeebled the institution of the jury." 1 De Tocqueville, *Democracy in America* (Reeve trans. 1948 ed.), 282-283.

Chief Justice Cooley set forth many of the reasons why jury trial is a necessary element of a fair trial:

> "The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." *People* v. *Garbutt*, 17 Mich. 9, 22 (1868).

This Court has often been called upon to reaffirm the vital place which the right to jury trial has in our Constitutional framework. The classic statement is contained in the landmark case *Ex parte Milligan:*

> "The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. • • •
>
> "This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safe-

> guards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." 4 Wall. [71 U. S.] 2, 122-24 (1866) [emphasis in original].

And in confirming the indispensibility of trial by jury even in civil cases, this Court said:

> "With, perhaps some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 474, 485-86 (1935).

Only recently, the Court has stated that,

> "This right of trial by jury ranks very high in our catalogue of constitutional safeguards." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955).

In a judgment striking down a court martial conviction obtained against a civilian dependant of a member of the armed forces, an opinion joined in by four of the Justices of this Court stated:

> "Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or conveniences." *Reid* v. *Covert*, 354 U. S. 1, 10 (1957) (Opinion of Black, J.).

That the right to jury trial has proved to be a crucial safeguard against the abuse of criminal process in a wide variety of contexts needs no elaborate citation of authority. But this right is even more important in the case of criminal contempt because of the novelty of the method of prosecution. There is an obvious built-in unfairness in permitting a judge, in order to "vindicate his authority" and who thus is the aggrieved party, to act as prosecutor, witness, jury and judge. It is elementary that no man can be judge in his own case and that no man is permitted to try cases where he has an interest in the outcome. *In re Murchison*, 349 U. S. 133, 136 (1955). Yet in criminal contempts, the judge, with the full panoply of his power, is an unequal match for the defendant. The judge's power to punish contempt is virtually limitless as to the scope of the offense, the means of punishment and the procedure employed. The only effective restraint upon him is the often ineffectual right of judicial review, where the sole question is whether the judge has abused his discretion. The judiciary, as the final bastion against oppression, must be free of even the slightest suggestion of unfair practices.

It has been argued that because of the favored position of these defendants in the eyes of Mississippians, no jury will be found to convict them. But the administration of impartial justice, and not the rendering of swift and easy convictions, is the business of the courts. Every procedural safeguard in the Constitution makes it more difficult to secure convictions, just as every other provision in the Bill of Rights affords an added measure of protection against the coercive power of the Government, whether existing or potential. That a particular Constitutional liberty may in some cases make it possible for the guilty to escape punishment has never been a reason for not invoking it. Experience has taught us that such a sacrifice is necessary to the vindication of a critical Constitutional principle. In the oft-quoted words of Mr. Justice Holmes:

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (dissenting opinion).

Finally, it may be argued that these defendants do not deserve a jury trial because of the flagrant nature of the contempts charged against them. But this Court has often rejected the proposition that because a particular defendant is a "bad man" his constitutional rights are not worth protecting. Unsavory characters may occasionally be benefited in order to affirm an important liberty.

II. Summary trial of criminal contempts is not "necessary" to vindicate the authority of the court or for any other reason.

As Mr. Justice Black observed in *Green* v. *United States*, 356 U. S. 165, 213 (1958), some who defend summary trial of the crime of contempt attempt to justify this procedure as a "necessity" if judicial orders are to be obeyed and the authority of courts is to be maintained. Even if there were such a "necessity", it is doubtful that it would permit a deviation from the Bill of Rights. But in fact, no "necessity" exists that conceivably warrants this extraordinary method of trial.

In the first place, criminal proceedings are unnecessary to assure compliance with lawful court orders. Civil contempt has always been the appropriate remedy to assure such compliance. As long as a defendant faces imprisonment for refusal to comply, a court's order will eventually be satisfied. Long ago, this Court described the limits of the power to punish for contempt as "[t]he least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. [19 U. S.] 204, 231 (1821). See also *In re Michael*, 326 U. S. 224, 227 (1945); *In re Oliver*, 333 U. S.

257, 274 (1948). The remedy of criminal contempt is a power in excess of the end proposed, compliance with court orders.

Related to the claim that compliance with court orders necessitates a summary trial is the assertion that a judge is able to dispose of a criminal contempt faster and cheaper, and thus more swiftly vindicate his authority. This idea misconceives both the purposes of the criminal law and of the Bill of Rights. Whatever speed and economies might result can hardly justify abandonment of a basic Constitutional protection. As Mr. Justice Black stated:

> "Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy." *Green* v. *United States*, 356 U. S. 165, 216 (1958) (dissenting opinion).

Even more important, once there is no longer any question of compelling compliance with a court order—the province of civil contempt—there can be no justification for swift disposition. In such cases, there is ample time to provide the defendant the full benefit of all Constitutional safeguards. This was recognized by Justices Holmes and Brandeis when they declared that "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425-26 (1918) (dissenting opinion). The instant case provides a dramatic example of the absence of any need for haste. It is now almost a year since the incident involving James H. Meredith's admission to the University of Mississippi that led to the citation of these defendants for contempt of the Court of Appeals. Meredith has been graduated, and there is no

present violence or any other reason which would justify a hasty trial for criminal contempt.

Equally unavailing is the contention that jury trial for criminal contempt, especially where racist sympathies exceed respect for federal courts, will subject judges to personal abuse and to courtroom disturbances because no jury will be likely to convict the miscreants. However, the present suit does not involve contempts in the presence of the court or so near to it as to disrupt proceedings. That category of contempts is not pertinent to the disposition of the present case. Moreover, Congress has specifically excluded this category when granting jury trials in certain types of criminal contempt. 42 U. S. C. § 1995; 29 U. S. C. § 528; 18 U. S. C. §§ 402, 3691, 3692.

The claim of "necessity", so clearly unpersuasive in the general run of cases, takes on a peculiar coloration in the present context. Lurking in the background of this case is the unarticulated premise that unless these defendants are criminally punished for violation of the order of the Court of Appeals, irreparable damage may befall the movement to secure civil rights for Negroes in the South and elsewhere. The idea is, no doubt, that only punitive action will prevent certain Southern officials from intervening with the authority and power of their offices to head off attempts to comply with judicial orders entered on behalf of Negroes. This claim lacks any validity and reflects a misunderstanding of the purposes of criminal contempt as well as the struggle of the Negro for equality. The resources of the law, including civil contempt, are sufficient to coerce governors and private citizens into compliance with lawful orders of federal courts. The subsequent invocation of the criminal process can have little or no added effect on the Government's ability to assure that such edicts are obeyed. The only purpose of such process is to *punish* violators for past acts, a punishment that surely need not be hasty or expeditious.

It should be obvious from recent events that the Negro civil rights movement does not depend on the criminal law. Within recent years, indeed recent months, the Negro has made historic gains in hundreds of communities in more than a score of states with the assistance, as far as we have been able to determine, of federal criminal contempt in only one episode. See *Kasper* v. *Brittain*, 245 F. 2d 92, 97 (6th Cir.), *cert. den.*, 355 U. S. 834 (1957); *Bullock* v. *United States*, 265 F. 2d 683 (6th Cir.), *cert. den.*, 360 U. S. 909, 932 (1959).

The paucity of such cases involving criminal contempt is particularly significant in light of the varied circumstances under which Negroes have sought vindication of their rights and the numerous court orders entered for this purpose. This strongly indicates that the availability of criminal contempt is unimportant to the success of the civil rights movement and that the just claims of the Negro can be achieved without subverting the Constitutional rights of any criminal defendant.

Finally, it may be suggested that a jury trial will virtually assure the acquittal of these defendants because a white Mississippi jury would not hold them in contempt for flouting an order to admit a Negro to the University of Mississippi. This may be so, but it is irrelevant to the present issue. Securing convictions is not the only goal of the criminal law. The means by which convictions are obtained has a claim of equal stature. This faith remains the cornerstone of our system of criminal law. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Only by adherence to it in all cases will the safeguards of the Bills of Rights be preserved for the benefit of all defendants who are hailed before the criminal bar. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

III. The power to punish contempt without a jury trial rests upon an historical error which should not be perpetuated as a Constitutional principle.

The constitutionality of the power to punish contempt summarily and without trial by jury has been bottomed on the assertion that it derives from the earliest origins of the common law, antedating the adoption of the Constitution. Blackstone asserts that the power derives from "long and immemorial usage." 4 Blackstone, *Commentaries*, *288. However, modern scholarship has discovered that this historical interpretation is at best dubious. In a notable series of essays, Sir John Charles Fox, Senior Master of the Chancery Division, has revealed that until the early part of the Eighteenth Century contempt was regarded as an ordinary proceeding attended with all of the procedural safeguards of a criminal trial. He details many instances where such cases were punished only upon indictment and after trial. Fox, *The King* v. *Almon*, 24 Law Q. Rev. 184, 191; 266, 270 (1908); Fox, *Eccentricities of the Law of Contempt of Court*, 36 Law Q. Rev. 394, 396 (1920). Fox's researches included an examination of the original rolls of the English courts and it was his conclusion that the power to punish contempt summarily, is without historical basis. Fox, *The Summary Process to Punish Contempt*, 25 Law Q. Rev. 238, 242-44 (1909).

The earliest assertion of the power appears in the proceedings of the infamous Court of Star Chamber. Fox, *The King* v. *Almon*, 24 Law Q. Rev. 266, 270 *et seq.* (1908); Hudson, STAR CHAMBER ([2 Hargrove] Collectanea Juridica) 117. After the abolition of the Star Chamber in 1641, no instance of summary punishment appears until 1721. Thereafter, there are a few widely scattered instances of the use of the power until the so-called "judgment" of Lord Chief Justice Wilmot in *The King* v. *Almon* (1765). In his opinion, Wilmot states that the power to punish contempt summarily,

> "'stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Charta as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it and therefore cannot be said to invade the common law but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society." Wilmot, *Notes of Opinions and Judgments*, 243, 254 (1802).

The prosecution involved in the case was later dropped and Wilmot's "judgment" was merely the *draft* of an *undelivered* opinion. Had it not been included in the publication of Wilmot's works ten years after his death, it would never have acquired the force of precedent. Fox notes the striking similarities between Wilmot's unfounded assertions in his 1765 opinion and Blackstone's statement in the fourth volume of his *Commentaries*, published in 1769, quoted *supra*, p. 11, and concludes that the former had great influence on the latter. Fox, *The Summary Process to Punish Contempt*, 25 Law Q. Rev. 238, 247, 253-54 fn. (k) (1909). Wilmot's opinion was not even cited in the English reports until 1821 and was not accepted as a leading authority until cited by Chancellor Lyndhurst in *Ex parte Van Sandau*, 1 Ph. 445, 454 (1844). Ironically, Wilmot's "judgment" has become the most widely cited authority for the proposition that the power to punish contempt summarily derives from the earliest origins of the common law. Not only was the historical basis of Wilmot's opinion erroneous, but, in addition, it rested upon a misconception of terminology. For as Frankfurter and Landis point out, Wilmot confused "immemorial usage" to punish criminal contempt with "immemorial usage" to

punish only after a jury verdict. Their article states, "For a hundred years the law has been seeking to extricate itself from his confusion." Frankfurter and Landis, *Power to Regulate Contempts*, 37 Harv. L. Rev. 1010, 1049 (1924).

Thus, Wilmot's historical error, perpetuated by Blackstone, has had its influence on the development of American Constitutional law. The case at bar presents the question whether Wilmot's erroneous assertion as to the common law origins of the power to punish contempt summarily should be forever enshrined as a Constitutional principle. Ancient historical error, in this case the fiction of "immemorial usage", should not furnish the precedent for a limitation of the right to jury trial, perhaps the most important single liberty guaranteed by the Constitution.

But even assuming that the English common law courts did possess the power to punish contempt summarily, our Constitution represented a radical departure from past practice. The Founders rejected many prevalent political and legal institutions and determined upon a new experiment in democratic government. The very concept of a written Constitution, alien to the English system, is reason enough for rejection of a *sub silentio* transplanting of summary punishment for contempt into American law. Mr. Justice Black has eloquently advanced this thesis:

> "[O]ur Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive governmental practice then tolerated, or thought to be, in England. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder.

> In truth there was wide-spread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified." *Green* v. *United States*, 356 U. S. 165, 212 (1958) (dissenting opinion) [citations omitted].

Article III, Section 2, of the Constitution provides:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

There is no implicit exception regarding contempt anywhere in the Constitution. Can it be denied that criminal contempt, carrying as it does a fixed sentence of imprisonment, as opposed to the indeterminate sentence of civil contempt, is within the meaning of the terms "all Crimes" and "all criminal prosecutions"? This Court has rejected any semantic distinction between the crime of contempt and other crimes. For instance, it has been held that a criminal contempt is within the federal statute of limitations. *Gompers* v. *United States*, 233 U. S. 604 (1914). In that case, the Court, speaking through Mr. Justice Holmes, said:

> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, and that at least in England it seems that they still may be and preferably are tried in that way." 233 U. S. at 610-611 [citations omitted].

Similarly, it has been held that criminal contempt is an "offense against the United States" within the presidential power of pardon. *Ex parte Grossman*, 267 U. S. 87 (1925).

This Court has often stated that the words of the Constitution are to be interpreted in their ordinary meaning:

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary meaning as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition." *United States* v. *Sprague*, 282 U. S. 716, 731 (1931).

In "normal and ordinary", as distinguished from "technical" usage, there can be no difference between criminal contempt and any other crime. The Seventh Amendment, which guarantees a jury trial in all suits at common law where the amount in controversy exceeds $20, presents a *reductio ad absurdum* of a construction which asserts that the Constitution excepted criminal contempt, punishable by a definite term of imprisonment, from the right of jury trial. Surely such a strained and unwarranted interpretation, based upon erroneous history, is incompatible with Constitutional principles and should be rejected by this Court.

IV. The doctrine of *stare decisis* does not impede a ruling that the Constitution bars a summary trial for criminal contempt.

Although criminal contempts have been tried summarily in the United States from the beginning, no substantial obstacle flowing from the doctrine of *stare decisis* bars this Court from returning to the correct Constitutional principle.

Mr. Justice Brandeis, in a famous passage, defined the extent of the Court's obligation to adhere to prior rulings:

> "*Stare decisis* is usually the wise policy because in most matters it is more important that the appli-

> cable rule of law be settled than that it be settled right. * * * But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406-08 (1932) (dissenting opinion).

In that case, Mr. Justice Brandeis referred to scores of cases in which the Court had overruled prior decisions. These decisions span virtually the Court's entire history and touch every aspect of its business. E.g., *The Genesee Chief*, 12 How. [53 U. S.] 443 (1851), overruling *The Thomas Jefferson*, 10 Wheat. [23 U. S.] 428 (1825); *Legal Tender Cases*, 12 Wall. [79 U. S.] 457 (1871), overruling *Hepburn* v. *Griswold*, 8 Wall. [75 U. S.] 603 (1870). In many of these instances, earlier decisions were overruled even though correction might have been secured by legislation. E.g., *Rosen* v. *United States*, 245 U. S. 467 (1918), overruling *United States* v. *Reid*, 12 How. [53 U. S.] 361 (1851). See generally, Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949).

Bowing before "the lessons of experience and the force of better reasoning," this Court has altered long-standing rules in order to rectify its own errors even to the present day. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), overruling *Swift* v. *Tyson*, 16 Pet. [41 U.S.] 1 (1842); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940); *Brown* v. *Board of Education*, 347 U. S. 483 (1954), overruling *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Mapp* v. *Ohio*, 367 U.S. 643 (1961), overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), overruling *Betts* v. *Brady*, 316 U. S. 455

(1942), are only a few of the many cases in which this Court has revised Constitutional decisions of the first magnitude.

The principles underlying *stare decisis* are particularly attenuated here. The issue presented is of constitutional dimensions and therefore is primarily for this Court. Moreover, no arguable questions of social and economic policy need be debated; as shown above, demonstrable historical error has for almost two centuries prevented defendants in criminal contempt actions from receiving the benefit of the Bill of Rights. In this setting, this Court certainly need not fear that it is exceeding its authority by acting as a "third branch of the legislature." This Court's obligation is undiluted by any of the other policies associated with *stare decisis*. In urging this result, Mr. Justice Black has stated:

> "No justified expectations would be destroyed by the course I propose. There has been no heavy investment in reliance on the earlier cases; they do not remotely lay down rules to guide men in their commercial or property affairs. Instead they concern the manner in which persons are to be tried by the Government for their alleged crimes. Certainly in this area there is no excuse for the perpetuation of past errors, particularly errors of great continuing importance with ominous potentialities." *Green* v. *United States*, 356 U.S. 165, 197 (1958).

The unbroken line of cases permitting summary trials in cases of criminal contempt are a monument to the ease with which historical error can be perpetuated, even in matters of the utmost gravity. This Court should recognize that error has been committed and that the error can be cured with no substantial infringement of the policies supporting continuity of decision. By rejecting the device of summary trial in criminal contempt actions, it will reaffirm the vitality of the "scheme of ordered liberty" that must at all costs be preserved.

Conclusion

The right to jury trial is one of the most crucial safeguards against tyranny and oppression contained in the Constitution. To dispense with that right and to permit a summary trial in cases of criminal contempt is justified neither by necessity nor by history. Indeed, the historical basis for the power to punish contempt summarily is a fiction which this Court should disavow. Adherence to precedent should not prevent this Court from correcting past errors, especially where a great Constitutional principle is at stake.

Respectfully submitted,

OSMOND K. FRAENKEL,
NORMAN DORSEN,
ALFRED LAWRENCE TOOMBS,
% American Civil Liberties Union,
156 Fifth Avenue,
New York 10, N. Y.

Attorneys for the American Civil Liberties Union, Amicus Curiae.

MELVIN L. WULF,
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 107

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,

VS.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE DEFENDANTS

JOE T. PATTERSON, *Attorney General of the State of Mississippi*

DUGAS SHANDS, *Assistant Attorney General of the State of Mississippi*

GARNER W. GREEN
JOSHUA GREEN
M. M. ROBERTS
FRED B. SMITH
MALCOLM B. MONTGOMERY, and
CHARLES CLARK

Special Assistant Attorneys General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

E. L. MUSSENHALL, INC., 1108 Oak Street, Kansas City, 6, Mo., HArrison 1-3080

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IN THE

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No. 107

OCTOBER TERM, 1963

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vs.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE DEFENDANTS

INTRODUCTORY STATEMENT

The prosecution has obviously framed its brief to try to cast this certification as a mere side issue to a segregation controversy. They evidently hope to thus arouse an antipathy toward those who stand accused which may obscure the deprivation of statutory and constitutional due

process. They openly state that the inconvenience of a jury trial which "embarrasses and retards" the vital business of the courts and the "hazard" of acquittal by unsympathetic jurors should be avoided. By this logic they attempt to create a *need* which authorizes departure from the sacred and fundamental statutory and constitutional procedural rights.

The words of Mr. Justice Rutledge are apposite here:

> "This case became a *cause célèbre* the moment it began. No good purpose can be served by ignoring that obvious fact. But it cannot affect our judgment save only perhaps to steel us, if that were necessary, to the essential and accustomed behavior of judges. In all cases great or small this must be to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it. No man or group is above the law, nor is any beyond its protection."[1]

QUESTION PRESENTED

We feel it may be helpful to here repeat that the question certified is:

> "Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and *the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of*

1. *U. S. v. United Mine Workers*, 330 U.S. 258, 342.

Congress, are such persons entitled, upon their demand, to trial by jury for the criminal contempt with which they are charged?"[2]

Both under Statute and as a matter of basic constitutional principle the answer should be yes.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The prosecution has omitted the following most pertinent statute:

Title 18, *United States Code*:

§ 1509. Obstruction of Court Orders.

"Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more that $1,000 or imprisoned not more than one year, or both.

"No injunctive *or other civil relief* against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime." Added,

Pub. L. 86-449, Title I, § 101, May 6, 1960, 74 Stat. 86. Other pertinent but omitted constitutional provisions, statutes and rules are set forth in the appendix.

STATEMENT OF THE CASE

Rule 28 of this Court requires a Court of Appeals certifying a question to state in its certificate the *facts* on

2. Emphasis in quotations is supplied unless otherwise indicated.

which such question or proposition of law arises. This the Court of Appeals for the Fifth Circuit did in twenty-one numbered paragraphs.[3] There are several omissions from their statement and one matter included as a "fact" by the Court to which the defendants take exception. Should any of these matters be considered material to making the correct answer to the question certified, then defendants would respectfully move this Honorable Court to require that the pertinent portions of the record be sent up for this Court's examination.

The first omission consists of the fact that on the 13th day of September, 1962, promptly after the order of Mr. Justice Black, terminating the conflict of orders within the 5th Circuit, was received by the District Court, that Court entered its injunction order in strict compliance with the several mandates of the Court of Appeals and Mr. Justice Black.[4] This District Court injunction more than encompassed every matter included within the various injunction orders of the Court of Appeals. Since its issuance, the District Court's injunction order has never been stayed, suspended or modified.

Paragraph 3 of the Court's statement of fact[5] contains the statement: "On September 18, 1962, this Court (Judges Brown, Wisdom and Bell), *after first ascertaining from the District Court that it declined to enter an order in this form*, entered its order allowing the United States to appear in the case." It may well be that some type of private

3. (C. 2-36.)

4. See Appendix, pages A56 through A59, of the Petition for Writ of Certiorari to this Court in *Mississippi et al.* v. *Meredith, etc.*, Cause No. 661, October, 1962, Term.

5. (C. 5.)

communication took place between some person or persons to support this assertion of fact; however, the entire record in *Meredith* v. *Fair* and the subsequent criminal proceedings against these defendants fail to show *any* record evidence as to how this "ascertaining" was done. If this "ascertaining" is, as the Prosecution claims, sufficient to form part of the justification for the extraordinary use of an Appellate Court to perform a normal and ordinary function of a Court of original jurisdiction and thereby create an option in the prosecution to deny Defendants their basic constitutional right to trial by jury, it certainly ought to rise to the dignity of being reflected in the official record of the proceedings.[6]

The Statement of Facts also omits that on the same day, September 25, 1962, and at the same hour, 8:30 A.M., that the so-called "Amicus Curiae" obtained a Temporary Restraining Order[7] the only real party in the proceeding, Meredith, also obtained a Temporary Restraining Order enjoining the Defendant, Governor Barnett, from "doing any act calculated to or which does interfere with the admission, registration or attendance of appellant (Meredith) at the University of Mississippi.[8]

The order of November 15, 1962,[9] ordering the Prosecution to institute Criminal Contempt proceedings against the Defendants also stated that it appeared that *"maximum procedural protection"* would be afforded by the criminal proceedings demanded, which were *required* by the order

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6. Cf. Judge Gewin's reference to this telephone "record". (C. 138.)

7. (C. 13.)

8. Appendix to Petition in Cause No. 661, Page A31.

9. (C. 31.)

to be brought under Rule 42(b) of the Federal Rules of Criminal Procedure. The order did not specify that the prosecutions were to be brought in the Court of Appeals.

The prosecution in its "Statement" and "Argument" devotes over one-fourth of its brief to a play upon the facts already delineated by the Court. Defendants respectfully submit that this is no more than a thinly veiled attempt to divert the Court's attention from the basic constitutional and statutory issues presented by the question certified. We particularly call to this Court's attention the erroneous statement that the District Court declined to enter an injunction order until after Meredith's "scheduled enrollment under the mandate of the Court of Appeals"[10] or "after the date for admission had passed".[11] The Court of Appeals mandate fixed no date for admission or scheduled enrollment. The period from September 20th through 24th, 1962, was designated for registration of new students for the fall semester by the University's General Catalogue Bulletin issued the previous spring, which is a part of the record below.

The assertion, in Argument, that the prosecution did not purposively by-pass the District Court[12] is positively denied, as is their additional extra-record statement that the District Court declined to enter appropriate decrees.[13] The Court of Appeals did not *intervene* "after long forbearance"[14] or otherwise. The record clearly shows that the prosecution *invoked* every proceeding taken by the Court of Appeals before criminal contempt. The record

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10. Brief, p. 7.
11. *Ibid.*
12. Brief, p. 33.
13. *Ibid.*
14. *Ibid.*

clearly shows also that every action requested of the District Court by the private party litigant and the prosecution was promptly and correctly acted upon by that court. The Prosecutors *sought out* the Court of Appeals as a source of orders, duplicating in every material aspect, orders obtained by the real party in interest. These are the indisputable facts. Whatever inferences are to be drawn therefrom are for this Court to draw.

ARGUMENT

POINT I

The Constitution of the United States Guarantees the Right to Trial by Jury in All Cases of Criminal Contempt

In the case of *Gilbert Green et al.* v. *United States*[15] this Court very thoroughly considered this proposition, and Defendants do not propose in this brief to "haul coals to Newcastle". With the utmost deference, we are convinced that the dissent of Mr. Justice Black, in which the Chief Justice of the United States and Mr. Justice Douglas concurred, is the better reasoned opinion and should now be adopted by this Court as the controlling rule.

For the Court's convenience, we have here attempted to paraphrase and condense this opinion, without including its copious authority and precedent:

Criminal contempts provide a striking example of how the great procedural safeguards erected by the Bill of Rights are now easily evaded by the ever-ready and *boundless expedients* of a judicial decree and a summary contempt proceeding.

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15. 356 U.S. 165.

Previous cases denying the right to trial by jury are *wrong—wholly wrong.* Courts are not omniscient. They too can profit from trial and error. This Court has a special responsibility to review its decisions in the field of constitutional law and to refuse to follow erroneous precedents. Early precedents have now been proven to be based on unfounded assumptions. Later cases merely cite the earlier ones. In this area there is no excuse for the *perpetuation of past errors.*

The majority's requirements that punishment for contempt be "reasonable" is a *trifling amelioration.*

The Courts have failed to make the proper distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past acts.

Summary trial of criminal contempt allow a single functionary of the state, a Judge, to lay down the law, to prosecute, to sit in judgment, and then within the broadest kind of bounds to punish as he sees fit. This is inconsistent with the most rudimentary principles of our system of criminal justice and *vests such functionaries with autocratic omnipotence.*

The Constitution obviously resulted from a determination to *fragment power* along different departments and institutions of government so that each would tend to operate *as a check on excesses* of any other. The Founding Fathers should have known that when they put the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian on a single man, he would be incapable of holding the scales of justice perfectly fair and true. Any defendant before him would be denied an objective, scrupulously impartial tribunal. Our system of laws has always endeavored to prevent even the possibility of unfairness.

The offense of criminal contempt has *the most ill-defined and elastic contours in our law*, yet it is punished by the harshest procedures known to that law. Appellate review cannot begin to take the place of a proper trial. The only limits on punishment are now whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of reasonableness. This is precisely the kind of arbitrary and dangerous power which our forefathers fought to stamp out. It is a *paradox* that it finds perpetuation in the courts.

Criminal contempt is manifestly a crime by every relevant test of reason or history.

The myth that criminal contempts have been summarily tried since time immemorial *has been exploded* by recent scholarship.

In the beginning arbitrary summary contempt was a petty, insignificant part of our law involving the use of trivial penalties to preserve order in the courtroom. But it has undergone an *incredible transformation and growth*. It is no longer the same comparatively innocuous power. It now finds important and far-reaching authorization for use in many fields of law through special statutory enactments. This power is utterly irreconcilable with the first principles of our system of government.

In the colonies trial by a jury of twelve laymen *and no less* was regarded as the *birthright of free men*. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. It is beyond comprehension how a layman could see any appreciable difference between the crime of contempt and other major crimes. Blackstone

openly classified contempt as a crime, but regardless of proof of colonial thinking, our courts and Bill of Rights were not designed to perpetuate every *arbitrary and oppressive governmental practice* then tolerated in England.

Stark necessity is an impressive and often compelling thing, but is too often claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. Closely examined the "necessity" argument states that trials conducted in accordance with the Bill of Rights will not result in conviction and punishment of a fair share of those charged. It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury, but *cheap, easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights.* In the long run due respect for the courts and their mandates would be much more likely if they faithfully observed the procedures laid down by our nationally acclaimed charter of liberty, the Bill of Rights. The classic example of this is the use and abuse of the injunction and summary contempt power in the labor field.

Crimes of contempt ought to be required to be punished under the Constitution just as all other crimes. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth.*

There are some areas of the discussion had there which we believe our additional research may illumine. There is also a fundamental difference in factual context between this case and the *Green* case. That difference

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*For ease of reference, this entire opinion is appended to this brief, p. A3.

is that on May 6, 1960, the Congress enacted a statute defining obstruction of court orders as a crime.[16] The acts which caused *Green's* convictions were not, at the time committed, proscribed by criminal statute.

A

Historical Data

History teaches that juries were originated by William the Conqueror. They were not originally instruments of freedom, but tools of oppression used to assure the Monarch that the "dooms" which these jurors pronounced on their neighbors in each manor would include all of that man's taxable land and property. They were the source of the Doomsday Book of 1086.[17]

The right to trial by a jury of one's peers is rooted in antiquity. This is borne out by the words of Mr. Justice Harlan in 1898:

> "When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law' which had fenced around and interposed barriers on every side against the approaches of arbitrary power. '2 Story, Const. §1779. In Bac. Abr. tit. "Juries" it is said: The trial per pais, or by a jury of one's country, is justly esteemed one of the *principal excellencies* of our constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of not being

16, 18 U.S.C. 1509.

17. *Sources of Our Liberties, Perry*, Am. Bar Found., 3; *Encyclopedia Britannia*. See heading "Doomsday Book".

> devested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P.C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment.'"[18]

One of the greatest victories in the struggle to preserve the jury system occurred in 1670 when the Quaker, William Penn, was acquitted of a charge of disturbing the peace by a jury, the members of which found themselves immediately fined and imprisoned by a judge who did not want the Crown to be denied the conviction it demanded. On appeal to the Court of Common Pleas the stalwart judges of that court unanimously voted to free the jurors.[19]

In the time of the Stuart kings when most of the colonies were established, jury panels were used, but they were hand picked to bring in the verdict desired by those in power.[20]

As encouragement to settle the new colonies, stipulations were made by the Crown that among the liberties the colonists would enjoy was the right to trial by jury.[21] Later King George III, to increase the revenue potential of the colonies, commenced a program of vigorous taxation including the odious Stamp Act of 1765. The King's Ministers entertained the same fear that has led to burgeoning use of criminal contempt in this country—that a jury system would not result in "adequate" enforcement

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18. *Thompson* v. *Utah*, 170 U.S. 343.

19. *Concise History of the Common Law*, 5th Ed., Plucknett, page 134; *Almanac of Liberty*, Douglas, pages 86-88, 149.

20. *Almanac of Liberty*, *supra*, page 195.

21. *Sources of Our Liberty*, *supra*.

of unpopular laws. Hence, enforcement of the Stamp Taxes was placed in the hands of the Admiralty Courts and right of trial by jury was denied. This action was, in large part, the leaven which raised the colonists to the War of the Revolution.

Long before this revolution, this *principal excellency*, the right to trial by jury, was embodied in the Declaration of Rights in nine of the thirteen colonies in these words:

> "That trial by jury is the inherent and invaluable right of every British subject of these colonies."[22]

When, "in the course of human events" it became necessary for them to dissolve their bonds connecting them with England, they specifically listed in that great document of July 4, 1776, the grievance: "For depriving us in many cases of the benefits of trial by jury".

Within a month after the Declaration of Independence most of the new states adopted constitutions guaranteeing jury trials in criminal and civil cases.[23]

In the making of the Constitution and the birth of the Bill of Rights, the right of trial by jury was the only procedural right which received a *triple guarantee*.[24].

With only the Constitution in hand, if one were asked if those who wrote the Constitution had a high regard for the institution of trial by jury, the questioner need only be asked to look around him. With deference, we submit that with the light of history illuminating these eternal principles of rational freedom, there can be no doubt that the blood,

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22. 43 *Harvard Classics*, 147.

23. *Sources of Our Liberties*, page 323 *et seq.* See also 39 *Harvard Law Review* 917, 968, 974.

24. Article III, Section 2, Clause 3, *Sixth Amendment*, *Seventh Amendment*; not to mention the right of grand jury indictment established by the *Fifth Amendment*.

sweat and tears of our forefathers was shed in abundant measure to secure to themselves and their posterity the right of trial by jury.

B

Substantive Due Process Requires That 18 U.S.C. 1509 Be Interpreted to Transpose Criminal Contempt Jurisdiction Included Therein into Federal Criminal Law

Obviously, if the conduct charged in this criminal contempt proceeding were proven, these acts would be a precise violation of the obstruction of the court order statute. The legislative history of this statute makes it clear that one principal reason for its enactment was to deal with the precise situation claimed to exist here.[1]

It is a firmly entrenched ruling of this Court that courts of the United States possess no common law criminal jurisdiction. They have only the power to punish such crimes as are defined by Congress.[2] Defendants stand accused of a contempt of court by an alleged act which is now clearly defined as a crime by the Congress and is punishable by indictment by a constitutional Grand Jury and trial by a constitutional Petit Jury in accord with all of the normal constitutional safeguards surrounding Federal Criminal procedure. The right of trial by jury is one such safeguard that has never been lightly regarded.[3]

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1. 60 U.S. Code Cong. and Adm. News, p. 1942 (Cf. p. 1961) and Hearings before Subcommittee on Constitutional Rights of the Judiciary Committee of U. S. Senate, 86th Congress, 1st Session 1959, pp. 186-189.

2. *U. S.* v. *Hudson and Goodwin*, 7 Cranch 32; *U. S.* v. *Hall*, 98 U.S. 343.

3. Blackstone called it "The glory of the English Law". 3 Comm. 379. In *Van Horne's Lessee* v. *Dorrance*, 2 Dallas 304, 309, decided 4 years after the Federal Bill of Rights was ratified, the U. S. Circuit Court of the District of Pennsylvania, referring to

The right of these defendants to have the full benefit of this safeguard cannot constitutionally be abridged by the mere choice of courts or proceedings by the prosecution or by an "offended" Court's choice to have these defendants summarily tried before it without these safeguards. Such an optional and uneven method of proceeding would clearly violate the due process clause of the 5th Amendment. In *Griffin* v. *People of the State of Illinois*,[4] this Court, speaking through Mr. Justice Black, the Chief Justice and Justices Douglas and Clark, said:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about

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§9 of the Pennsylvania Bill of Rights, which is thought to have influenced Madison's draft of the 6th Amendment, said: "If the Legislature had passed an act declaring, that, in future, there should be no trial by Jury, would it have been obligatory? No. It would have been void for want of jurisdiction, or constitutional extent of power.. The right of trial by Jury is a fundamental law, made *sacred* by the Constitution, and cannot be legislated away."

Compare this Court's language in *Ex parte Milligan*, 4 Wall. 2, 123 (1886): "The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' *language broad enough to embrace all persons and cases*"; and the words of Justice Story: "When our more immediate ancestors removed to America, they brought this *great privilege* (trial by jury in criminal cases) with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a *fundamental* right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 *Story, Const.*, Sec. 1779.

4. 351 U.S. 12, 16.

> in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly *equal application of criminal justice*. In this tradition, our own constitutional guaranties of due process and equal protection *both* call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. *Both* equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' Chambers v. Florida, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716."[5]

If, for precisely the same act, one man can be tried by a jury under the statute only after indictment while another may be attached to appear for summary trial before the court whose order he allegedly disobeyed, the obvious result is a critical *lack of equality before the bar of justice* which is a violation of due process. This erroneous result can only be avoided by recognizing that Congress intended to preempt the action described in the criminal statute from the field of contempt and to require courts to process such actions in the regular constitutional manner in which all crimes are tried.

Under the aegis of "Due Process", this court has gradually built for itself a set of acceptable limitations on

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5. It is interesting to note that in concurring Mr. Justice Frankfurter classified capital offenses as "*sui generis*"—the term often applied to criminal contempt to modulate its constitutional status. 351 U.S. 21.

the exercise of criminal contempt power in cases of the category here presented. These required procedural devices are:

(1) The accused is presumed innocent, proof of guilt beyond a reasonable doubt is required, and the accused cannot be compelled to testify against himself.[6]

(2) The accused is entitled to advice as to the charges against him, a reasonable opportunity to prepare a defense, the benefit of compulsory process, and the assistance of counsel.[7]

(3) The accused is entitled to an impartial arbiter of fact.[8]

(4) The accused is entitled to a public trial.[9]

(5) The accused is entitled to the benefit of a statute of limitations governing crimes.[10]

(6) The sentence imposed must be "reasonable".[11]

(7) A person convicted of criminal contempt is entitled to be admitted to bail.[12]

(8) A person convicted of criminal contempt may be pardoned by the President under the President's constitutional authority to pardon "criminal offenses."[13]

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6. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418.

7. *Cooke* v. *U. S.*, 267 U.S. 517.

8. *In re Murchison*, 349 U.S. 133.

9. *In re Oliver*, 333 U.S. 257.

10. *Gompers* v. *U. S.*, 233 U.S. 604.

11. *Green* v. *U. S.*, *supra*.

12. Rules 42(b) and 46, *Federal Rules of Criminal Procedure*.

13. *Ex parte Grossman*, 267 U.S. 87.

Cf. *Wood* v. *Georgia*, 368 U.S. 894. A criminal contempt proceeding canot be conducted by a state court where the result

The only constitutional procedural guarantees still omitted are indictment by a Grand Jury, the right to a speedy trial by an impartial jury, and the prohibition against double jeopardy. No question has yet been raised in this court as to venue,[14] which may become an issue in this case. The Court's reasoning is that these restraints are required by the due process clause of the 5th Amendment[15] and are commensurate with the exercise of "the least possible power adequate to the end proposed."[16]

While a majority of this Court has held that a proper construction of the Constitution permitted the power to be implied around that document into the Federal Courts to summarily deal with crimes of contempt, it has inconsistently but continuously recognized the power of Congress to limit these "inherent" contempt procedures;[17] and in this case the obstruction of court orders statute defines an area which Congress has withdrawn from the exercise of *criminal* contempt. The result reached by such a holding has been previously urged by respectable authority.[18]

The Court's holding in *Ex Parte Savin*[19] is not to the

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is to abridge the constitutional guaranty of free speech; and *Deutch* v. *U. S.*, 367 U.S. 456. Contempts of Congress are processed and punished as other crimes.

14. See *Houston & N. Texas Motor Freight Lines, Inc.*, v. *Local 745*, (N.D. Tex.) 27 F. Supp. 145.

15. *Levine* v. *U. S.*, 362 U.S. 610, 616.

16. *Anderson* v. *Dunn*, 6 Wheat. 204.

17. *Ex parte Robinson*, 19 Wall. 505; cf. *Michaelson* v. *U. S.*, 266 U.S. 42, and *In re McConnell*, 370 U.S. 230.

18. *Works of Edward Livingston.*

Cf. Contempt of Court, Criminal and Civil, Joseph H. Beale, Jr., 21 *Harv. L. Rev.* 161.

19. 131 U.S. 267.

contrary.[20] Rather, it supports the position here urged. The statute[21] there considered did not create and define a crime, but rather it contained a definition of permissible areas of contempt jurisdiction, and, of course, it did not contain any provision similar to §1509, saving out of the statute's ambit only *civil* relief against the conduct specified as criminal.[22] Neither does *Savin* give any consideration to the point made in *Griffin, supra.* The Court may also wish to consider the fact that §1509 was enacted in full hindsight of *Griffin's* teaching.

Of course, no one would contend that companion criminal statutes and rules do not preserve to every court the right to summarily deal with contempts committed in its presence.[23]

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20. Cf. Judge Cameron's remarks in his separate opinion and his reference to *Nye* v. *U. S.*, 313 U.S. 33. (c. 94.)

21. Act of Mar. 2, 1831, c. 99; 4 St. 487; Recodified by the revisor as §§ 725 and 5399 of Rev. St. While the revised statutes were authorized by Congress, they were not official. They were *prima facie* evidence of already existing law. Cong. Rec., 45th Cong., 2nd Sess., pp. 1376, 7. The court may be interested to note that in rescripting § 725 the revisor omitted the crucial word "summary". Its omission has passed unnoticed until now except in *Savin, supra,* where the court simply affirmed the summary power to proceed as to contempts *in the presence of the court or so near thereto as to obstruct the administration of justice,* which was not proscribed by the Act of Mar. 2, 1831, anyway. [*Savin* involved an attempted bribe of a witness in a room adjoining open court. (Physical nearness did not become an issue until *Nye* v. *U. S.*, 313 U.S. 33.) *In re Terry,* 128 U.S. 289, cited in *Savin,* involved an assault on a marshal in open court.]

22. This is another distinction from the *Green* case. The Jumping Bail statute there involved expressly reserved power to *"punish"* the same act as contempt—a purely criminal function. 356 U.S. 173.

23. Federal Rules of Criminal Procedure, Rule 42(a); 18 U.S.C., § 1995 (Voting Rights), § 3691 (Anti-Trust), and § 3692 (Labor Disputes).

Another very important aspect of Constitutional Due Process is embodied in the suggestion of Judge Bell of the Court of Appeals for the Fifth Circuit in which he indicated that the court should have certified an additional question which is, we submit with all due respect, implicit in the question presented; namely, whether or not this court should require these proceedings to be tried before a District Court.

In *In re Murchison*,[24] this Court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end *no man can be a judge in his own case* and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that *'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.'* Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.
>
> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations."

The Court's attention is further directed to two pertinent provisions of Title 28, *United States Code*:

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24. *Supra*, p. 17.

Section 144 gives any *party* the right to file a timely affidavit that the District Judge before whom the matter is pending has a personal bias or prejudice. Upon the filing of this affidavit the Judge must immediately refer the matter to another Judge for hearing. This statute affects only District Courts.[25]

Section 455 of the same title is the only statute applicable to appellate judges. It provides that the judge shall disqualify himself in any case where "in *his* opinion" he has a "substantial interest".

In *Adams* v. *United States*[26] the Fifth Circuit held that the words "substantial interest" in §455 meant a pecuniary or beneficial interest or an interest equal to a lawyer pursuing litigation in behalf of his client. They there expressly approved of the conduct of a trial by a judge who had acted as the prosecutor at the time of the indictment.[27]

We submit the disparity between remedies available to question the open-mindedness of the prospective trial judges in a regular trial court as opposed to the appellate tribunal here involved intensifies the lack of procedural due process available to these defendants.

To answer the prophets of doom who say that the "efficiency" and effectiveness of the Court would be im-

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25. *Kinney* v. *Plymouth Rock Squab Co.*, (1st Cir.) 213 Fed. 449; *Millslagle* v. *Olson*, (8th Cir.) 128 F.2d 1015; *Duke* v. *Committee, etc.*, (D.C. Cir.) 82 F.2d 890; *Cf. Ryan* v. *U. S.*, (8th Cir.) 99 F.2d 864, 871.

26. 302 F.2d 307.

27. Cf. The changes made in the new uniform code of military justice which require all but petty prosecutions to proceed before a court convened by a person of superior rank to the accuser at whose instance the charges were brought. 10 U.S.C., §§ 822, 823.

paired if these views be adopted here, we would recall Mr. Justice Black's analytical reminder that the only subject dealt with here is criminal contempt—that species of the contempt power which concerns itself with *punishment* for a past wrong for the purpose of seeking vindication and preventing similar misdeeds in the future.[28] Every *remedial* civil power to preserve order and secure rights adjudicated would remain unimpaired; only the Defendants' fundamental due of basic constitutional procedural guarantees are here asserted.

C

The Court's Decision in Green v. U. S. Should Be Reversed

At the outset of this discussion, it seems appropriate to note that no greater compliment to the logic and persuasiveness of the constitutional dissent in the *Green* case could be tendered than has been paid by the Brief for the United States. It devotes half its argument and the citation of 75 cases to an attempt to persuade the Court not to adopt this position.

The prosecution admits that a consideration of criminal contempt procedures by the Founding Fathers cannot be historically authenticated.[1] The Constitution's only expressed exception to the guarantee of jury trial in criminal cases was "in cases of impeachment", which is certainly a

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28/ This distinction between civil and criminal contempt proceedings has caused confusion, as witness Mr. Justice Brewer's words in *In re Debs*, 158 U.S. 564, 596; which resulted in fixed prison terms for the defendants:

> "In brief, a court *enforcing obedience to its orders* by proceedings for contempt, is not executing the criminal laws of the land, but only *securing to suitors* the rights which it has adjudged them entitled to."
>
> Cf. *Gompers* v. *Buck's Stove and Range Co.*, 221 U.S. 418.

1. Brief, p. 49.

proceeding that is *sui generis*, and uniquely extra-judicial.[2] If usual rules of interpretation are applied, expressing a single specific exclusion creates a stronger presumption that no other exceptions were intended than would have been present if no exception whatsoever had been made.[3] History assures us that the words of Art. III, Section 2, Clause 3, met with immediate dissatisfaction in the new Union. It also teaches that the Bill of Rights had a purpose of specifically defining the scope and nature of trial by jury. The explicit guarantee of that right was one purpose intended. The people thought so much of it that they wanted the right of trial by jury well defined. Criminal contempts were not in any way excluded from this safeguard and should not be read out by implication.[4]

It is difficult to comprehend the logic of those who argue that a thoroughly discredited and an uncertain historical background have combined to justify a strained construction of the normal import of words used by those who had so recently passed from under the heel of an oppressive monarch whom they criticized for depriving them of the right to trial by jury in their Declaration of Independence.[5]

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2. However, the extent of punishment which can be imposed is fixed rather than unlimited." Article I, Sec. 3, Cl. 7.

3. Cf. *Pine Grove Township* v. *Talcott*, 19 Wall. (86 U.S.) 666, "The case as to the Constitution (of Michigan) is a proper one for the application of the maxim, *Expressio unius est exclusio alterius.*"

4. *U. S.* v. *Classic*, 313 U. S. 299, 316. "If we remember that 'it is a constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

5. Lesser, *History of the Jury System*, 151. It may well be that the majority opinion places undue reliance on the colonial impact of one portion of Blackstone's work, since Blackstone

Giving even honors to the contentions that history establishes, and on the other hand, fails to establish, the use of summary procedures in criminal contempt in English courts after the abolition of the infamous Star Chamber, we can only find that history proves that the Federal convention was as silent on the precise subject as is the Constitution itself.

The prosecution turns to the stirring words of the Federalist on preserving the benefits of an impartial judiciary, but the Court knows that this very Hamilton struck equally stirring phrases in favor of trial by jury.[6]

The majority opinion in the *Green* case also advances the assurance that the contempt power is subject to judi-

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also commented that summary procedure was "not agreeable to the genius of the Common Law in any other instance." 4 *Bl. Comm.*, c. 20, §2. Consider also the further observation of the commentator in 57 Mich. L. Rev. 258, 261: "It is at least conceivable that this last phrase had an even greater influence on colonial lawyers than Blackstone's statement of the *Almon* doctrine. Moreover, the views of some of the other authorities available to the colonials should perhaps be considered. For example, a widely-used law dictionary said that the summary nature of an 'attachment' for contempt would be contrary to the jury trial provision in Magna Charta, and 'must be for a contempt in the face of the court' or else for a contempt committed by officers of the court." (*Jacob's Law Dictionary*, 9th Ed. (1772), cited in Fox, The History of Contempt of Court, 38 (1927).)

6. "The more the operation of the institution (of trial by jury) has fallen under my observation, the more reason I have discovered for holding it in high estimation." *The Federalist*, No. LXXXIII, Lodge Ed., 521.

"Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism . . . The trial by jury in criminal *cases*," therefore, "is provided for." *The Federalist*, No. LXXXVIII, Lodge Ed., 521.

cial review—an assurance which Mr. Justice Black characterizes as a "trifling amelioration".[7] In the present case even that characterization might be subject to considerable scepticism.

This proceeding is now before a Circuit Court of Appeals. The statutes provide the defendants with no *right* of appeal. They only have permission to apply to this Court for a Writ of Certiorari.[8] As to the basic issue of guilt or innocence of contempt, the question presented would be one of fact which this Court has consistently refused to review.[9] The only question "review" covers is the *amount* of the punishment inflicted.

The reasoning is advanced by the majority opinion in *Green* that a summary trial is "necessary". The prosecution devotes the principal portion of its constitutional argument to this *"need power"*. It speaks of the dangers that a single juror lacking sympathy with the underlying order could render the order "ineffective".[10] This argument condemns and would abolish the constitutional principle of trial by jury in *every* case. The assertion ignores the very purpose of criminal contempt, which is not to coerce enforcement but to punish disobedience. *The orders alleged to have been violated here have long ago met with full compliance; in fact, the litigant has now graduated.* The

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7. 356 U.S. 197.

8. Discretionary review was substituted for writ of error by 26 Stat. 826. Also Cf. Mr. Chief Justice Taft's concurring opinion in *Craig* v. *Hecht*, 263 U.S. 255, 278, 9. The review is of right in a Court of Appeals. In this Court a defendant has only the opportunity "to apply" for review.

9. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324; *In re Terry*, 128 U.S. 289; *In re Debs*, 158 U.S. 564.

10. Brief, p. 48.

purpose of these criminal proceedings is to determine the propriety of imposing a purely penal sanction for past action.

The prosecution brief further talks of a jury trial embarrassing and retarding the business of the courts. Which of the guarantees in our Constitution won't embarrass and retard those autocratic acts which make Government by a despot simple and expedient (in the despot's view, at least)? Our prosecutors do not heed de Tocqueville, who admonished against confusing the familiar with the necessary. Compare Mr. Justice Moody's apt words:[11]

> "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' Holden v. Hardy, 169 U.S. 366, 388, 42 L. Ed. 780, 789, 18 Sup. Ct. Rep. 383."

Certainly the most convincing argument against continuing to allow extra-constitutional summary punishments of contempts on the justification of this so-called "need power" is found in Circuit Judge Caldwell's dissenting remarks in *Hopkins* v. *Oxley Stave Co.*[12] sixty-five years ago:

> "But the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with

11. *Twining et al.* v. *New Jersey*, 211 U.S. 78.

12. 83 Fed. 912.

the Chancellor. *Those who justify or excuse mob law do it upon the ground that the administration of criminal justice is slow and expensive, and the results sometimes unsatisfactory.* It can make little difference to the victims of short-cut and unconstitutional methods whether it is the mob or the Chancellor that deprives them of their constitutional rights."

If Judge Caldwell's reasoning still be deemed insufficient, we urge the Court to consider its holding in *In re Debs*,[13] before the rationale of that case was terminated by statute.[14] In the early 1890's the railroad barons had acquired an inordinate economic power over their employees. Any man who dared speak out against management practices, work hour or wages was dismissed and black-listed. Such unions as there were, were so small and jealous of the individual craft they represented that they were totally ineffective as bargaining agents. Eugene Debs was a principal organizer of the American Railway Union which attempted to band together several of the independent unions to achieve a more workable bargaining position. His union staged one successful strike against one of the larger railroad companies and was fast gaining in popularity. The Pullman Palace Car Company, which in those times was still controlled by its dominating Founder, chose to cut the wages of its employees without making any provisions for relief to the employees covering house rents and food stuffs. (Almost all Pullman employees lived in company-owned houses and purchased their furnish from company-owned stores). Debs' union called a strike against every railroad operating Pullman cars to force Pullman to make an adjustment to relieve the employees' economic squeeze.

13. 158 U.S. 564.

14. 18 U.S.C. 3692.

In several areas where the actions of the Pullman Company were the subject of widespread public resentment, great hordes of people joined the striking American Railway Union. Through Pullman's influence on state and national leaders, members of the National Guard and troops of the United States were used for strike breaking purposes. Property damage and personal injury resulted. When this course was not fully effective the Federal Government secured an injunction from the United States District Court against the maintenance of the strike. Debs refused to abandon his position. The Court in a summary proceeding cited, tried, convicted and imprisoned Debs and his principal lieutenants. The strikers were demoralized, the strike was broken and Pullman's domination was reinstated.

But for the intervention of Congress, such a practice could have still been continued in labor disputes to this day. It is not hard to imagine that labor's voice in this country would be little heard and less heeded if such practices had been allowed to continue.

The basis for the Debs decision was necessity and "efficiency".[15]

In this present case, in the face of a positive statutory enactment making obstruction of court orders a Federal crime, we have the anomalous situation of the prosecution by-passing a court of original jurisdiction (whose then pending injunction was, if their criminal information charges be proven, as threatened with obstruction as was the mandate—"injunction" of the Court of Appeals) and seeking from the appellate court a writ to prohibit conduct which a statute had already criminally proscribed.

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15. 158 U.S. 595.

"The courts of America, and especially the federal courts, have shown a disposition to extend their powers beyond any limits heretofore recognized. In seeking to restrain acts in their nature purely criminal, and punishing by summary proceedings for contempt persons accused of committing those acts, they have been charged with usurping the functions of the criminal law; in seeking to restrain all persons, whether parties to the suit or not, and whether identified or not, they have been charged with issuing decrees legislative rather than judicial."

"It is not one of the functions of a court of equity to prevent the commission of threatened crimes."

". . . an injunction against . . . an . . . overt breach of the peace can have no tendency to prevent the act enjoined except by fear of punishment. That sanction the law already attaches to its prohibition of the same act, and whatever will justify punishment for contempt in such a case will equally justify punishment for the criminal act which constitutes the contempt."

These words were not written about the case of *Meredith v. Fair*, nor were they written in the year 1963. They are the words of William H. Dunbar of Boston, Massachusetts published in October of 1897 in his scholarly comment on the case of *In re Debs*.[16] We respectfully submit they could have been no less apropos had they been written with this case and this day in mind. The Court also knows that one of the great maxims of equity is *equitas sequitur legem*—equity follows the law. Equity does not intrude in matters plainly and fully covered by statute.[17]

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16. "Government by Injunction," 18 Law Q. Rev. 347.

17. *Magniac* v. *Thompson*, 56 U.S. 281; *Hedges* v. *Dixon County*, 150 U.S. 182.

Much reliance is placed by the majority opinion in *Green* as to the preciseness with which the terms "crime" and "criminal proceedings" were used in the Constitution.[18]

In considering the weight that is to be assigned to this assumption, without proof, that great attention was given to a precise selection of these words, we respectfully ask the Court to consider its own vagaries in this direction. In *Ex Parte Grossman*,[19] the Court held that conviction of criminal contempt was a criminal "offense" subject to the presidential pardon power. Yet, in *In re Debs* the Court expressly affirms permission for double jeopardy prosecutions for criminal contempts which are also statutory crimes. Thus we find that this Court has thoughtfully and deliberately classified a criminal contempt as an "offense" under one section of the Constitution and "not an offense" under another.[20]

Mr. Justice Black feels that there are no limits on the punishment a judge can impose in criminal contempt, except for the 8th Amendment's vague prohibition against cruel and unusual punishments. If even this is correct, it is difficult to logically understand how this prohibition can be successfully asserted if the court system on which the Constitution was based recognized no right to limit the sentence of a court vindicating its authority by way of criminal contempt. The Star Chamber, where the loss of right to trial by jury occurred and where summary criminal contempts originated, frequently indulged in such methods of contempt punishment as the rack and the screw.

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18. 356 U.S. 186.

19. 267 U.S. 87.

20. Cf. *Gompers* v. *U. S.*, 233 U.S. 604, and *New Orleans* v. *New York Mail Steamship Co.*, 87 U.S. 387, 392.

Why is one constitutional protection lost and another saved? Or is it saved?[21]

While this Court has looked with inconclusive results to the practice of the courts of England and the colonies to support a deprivation of the right to trial by jury, it has since time immemorial been wedded to the proposition that a correct interpretation of the Constitution was to be found in the plain and ordinary meaning of the words used by the people themselves.[22] What plain ordinary man of today or yesteryear, given the Constitution to read, would find an exception to constitutional rights to be accorded one accused of criminal action in cases of criminal contempt? It has been said that the men who composed the convention were learned in law and conversant with English history, but it must be remembered that they only proposed the document for ratification by the States. The more pertinent question would be the extent of eruditeness of those who cast the ballots which brought the document alive. Can anyone accurately characterize their knowledge? The learned discussions in the various state as-

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21. Circuit Judge Vinson (later Chief Justice of the U. S.) observed in *Warring* v. *Huff*, 121 F.2d 641, "the contempt statute sets no maximum (punishment), not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge." Previously in these proceedings the Court of Appeals disregarded the statutory limitation of "fine *or* imprisonment" in its *civil* contempt judgments and ordered that both fine *and* imprisonment be imposed. Appendix to Petition for Certiorari, Cause No. 661, pp. A38 and A41. This Court refused review. ____ U.S. ____, 83 S.Ct. 722, Feb. 18, 1963.

Thirty of the fifty states have maximum penalties for criminal contempt fixed by statute. See Appendix B to Brief for Petitioners in *Green* v. *United States*, Cause No. 100, October Term, 1957

22. *Gibbons* v. *Ogden*, 9 Wheat 1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 107

UNITED STATES OF AMERICA,

vs.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AMICUS CURIAE FOR THE STATE OF MISSISSIPPI

INTEREST OF THE AMICUS

The Governor and the Lieutenant Governor of the State of Mississippi, acting pursuant to the requirements of the Constitution and the statutes of this State and in the discretionary discharge of their oaths of office, performed actions which this case calls into question. This action is an attack upon the sovereignty of the State of Mississippi.

The State of Mississippi has an additional interest in protecting its duly elected officials and in preserving peace, tranquillity and the orderly processes of government within its borders. The seizure of the State's duly elected executive officers by an assertion of superior sovereignty and contrary to the orderly processes of impeachment as made and provided by the laws of this state, would be nothing short of a disaster.

ARGUMENT

I

This Action Is an Impermissible Suit by the United States Against the State of Mississippi

1. In the argument of the Solicitor General, as the basic conception, he declares, p. 19:

> "In this extraordinary case the defendants are charged with criminal contempt of a federal court order. Although the alleged *contemnors are the Governor and Lieutenant Governor of a State, they stand before the bar on the same footing with other citizens.* Just as the highest executive officials of a State are obligated to obey federal authority, Cooper v. Aaron, 358 U.S. 1, 18-19; Sterling v. Constantin, 287 U.S. 378, 397-398, so are they entitled, when charged with flouting that authority, to the same rights and privileges—no more and no less—as the law confers upon ordinary citizens."

With deference, the standing of individual citizens before the Constitution is not now in issue and this declaration is a begging of the basic question. The authority whereon the Solicitor General relies is thus stated, p. 55:

> "* * * Certainly, the high office of the defendants in this case gives no occasion to fashion a special rule.

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' United States v. Lee, 106 U.S. 196, 220."

That quoted represented the then majority opinion but note:

(a) This was a five to four decision, the four dissenters being the Chief Justice, Mr. Justice Bradley, Mr. Justice Woods and Mr. Justice Gray.

(b) (1) *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 696, 93 L. ed. 1628, 1639:

> "United States v. Lee, 106 U.S. 196, 27 L. ed. 171, 1 S. Ct. 240 (1882), is said to have established the rule for which the respondent contends. It did not. It represents, rather, a specific application of the constitutional exception to the doctrine of sovereign immunity. The suit there was against federal officers to recover land held by them, within the scope of their authority, as a United States military station and cemetery. The question at issue was the validity of a tax sale under which the United States, at least in the view of the officers, had obtained title to the property. • • •.
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> • • •
>
> "The Lee case, therefore, offers no support to the contention that a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate that the officer holding the property is not validly empowered by the sovereign to do so. Only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the Lee case require that conclusion. • • •"

(2) *Malone* v. *Bowdoin*, 369 U.S. 643, 645, 8 L. ed. 2d 168, 170:

"For its view that the sovereign immunity of the United States did not bar the maintenance of this suit, the Court of Appeals found principal support in United States v. Lee, 106 U.S. 196, 27 L. ed. 171, 1 S. Ct. 240. In that case the Virginia estate of General Robert E. Lee had been acquired by the United States for nonpayment of taxes, although the taxes had in fact been tendered by a third party. An ejectment action was brought against the governmental custodians of the land, upon which a federal military installation and a cemetery had been established. The trial court found that the tax sale had been invalid, and that title to the land was in the plaintiff. This Court upheld a judgment in favor of the plaintiff upon the trial court's finding that the defendants' possession of the land was illegal, holding that a suit against possession of the land was illegal, holding that a suit against them under such circumstances was not a suit against the sovereign.

"In a number of later cases, arising over the years in a variety of factual situations, the principles of the Lee Case were approved. *But in several other cases which came to the Court during the same period, it was held that suits against government agents, specifically affecting property in which the United States claimed an interest, were barred by the doctrine of sovereign immunity.* While it is possible to differentiate many of these cases upon their individualized facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task.

"The Court's 1949 Larson decision makes it unnecessary, however, to undertake that task here. For in Larson the Court, aware that it was called upon to 'resolve the conflict in doctrine' (337 U.S., at 701), thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents.

"In that case a suit had been brought against the War Assets Administrator to enjoin him from selling surplus coal which, it was alleged, the Administrator had already sold to the plaintiff. The theory of the action was that where 'an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers,' and that the officer 'may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.' 337 U.S., at 692. The Court held that this theory was not adequate to support a conclusion that the relief asked was not relief against the sovereign.

"Cutting through the tangle of previous decisions, the Court expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.' 337 U.S., at 702. Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States.

"While not expressly overruling United States v. Lee, (U.S.) supra, the Court in Larson limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the Lee decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted Lee as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U.S. at 696.

> So construed, the Lee Case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.' Id. 337 U.S. at 697."

See also Mr. Justice Douglas' dissenting opinion, 389 U.S. 650, 8 L. ed. 2nd 173.

Under *Collector* v. *Day*, 78 U.S. 113, 20 L. ed. 122, a dual sovereignty had to co-exist and, therefore, under the *Lee* Case, *supra*, as modified by this Court, there was no right, with deference, to sue the State as was done and to include in the restraining order its officers who were but instrumentalities of the State within *Collector* v. *Day*, *supra*, essential to conduct its business. Compare *Fitts* v. *McGhee*, 172 U.S. 516, 43 L. ed. 535.

2. The Solicitor General relies upon *Sterling* v. *Constantin*, 287 U.S. 278, 77 L. ed. 375, Br. p. 19; but, with deference, herein neither Barnett, as Governor, nor Johnson, as Lieutenant Governor, assumed unconstitutionally to seize any property belonging to another, but only to conserve in the emergency the peace and dignity of the State in accordance with their oaths of office; and when they thus so did, the immunity whereto they were entitled as such State officers is thus stated in *Sterling* v. *Constantin*, 77 L. ed 386:

> "* * * As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full

recognition of its importance. It is with appreciation of the gravity of such an issue that the governing principles have been declared.

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, 'necessarily results from the nature of the power itself, and from the manifest object contemplated.' The power 'is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.' Martin v. Mott, 12 Wheat. 19, 29, 6 L. ed. 537, 540, 541. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. Luther v. Bordon, 7 How. 1, 45, 12 L. ed. 581, 600; Moyer v. Peabody, 212 U.S. 78, 83, 53 L. ed. 410, 415, 29 S. Ct. 235. The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in Moyer v. Peabody, supra, the Court sustained the authority of the Governor to hold in custody temporarily one who he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor 'may kill

persons who resist,' he 'may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.' * * *."

Compare *Cunningham* v. *Neagle*, 135 U.S. 1, 34 L. ed 55, 75:

"The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

* * *

"* * * To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was neces-

sary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. * * *"

Reverse the positions and substitute Mississippi for the United States and when the Governor did those things, according to his oath in manner and form as he understood it, and was required to do by the law of the State of Mississippi (that Mississippi's law so required can be demonstrated before its Supreme Court in accordance with *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L. ed. 2d 562), and in performing his duty, he was the State of Mississippi. The state is the sovereignty which should under the authorities make the determination as to the necessity and propriety of what was done.

II

The Cause Should Be Dismissed As Moot

When the State, through its administrative officers at the University, determined Meredith not qualified to enter as a man, such decision was not subject to review except as declared in *California Co.* v. *State Oil & Gas Board*, 200 Miss. 824, 27 So. 2d 542. Under the Federal law, such determination was a "little law"—possibly a "statute", *United States* v. *Mersky*, 361 U.S. 431, 4 L. ed. 2nd 423; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U.S. 600, 76 L. ed 515, and not reviewable except, with deference, in accordance with the rule in Mississippi. Compare *Light, Heat & Water Co.* v. *Jackson*, 73 Miss. 644, 19 So. 771; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155.

The Solicitor General has assumed to quote the declaration of the President that he, under his oath, had assumed that his duty under the law as he understood it re-

quired action. We claim on behalf of the Governor the same oath and the same obligation to obey. That at issue would be between the United States and the State not as a criminal action but in accordance with the Constitution purely civil. *Between sovereignties there is no law of crime.* Neither can do a wrong, and certainly the law would not tolerate this issue between the President and the Governor to be adjudged in a court as a question of fact. Our submission is that when Meredith graduated he received all vouchsafed to him by the judicial decrees, and having so done, there is now no longer a case or controversy, as was commented by Mr. Justice Douglas in *Williams* v. *Simons*, 355 U.S. 49, 2 L. ed. 2d 87, 92:

> "This Court is empowered by the Constitution to decide cases and controversies. U.S. Const., Art. III, Sec. 2. A cause that has become moot is not a case or controversy in the constitutional sense. Amalgamated Asso. S.E.R.M.C.E. v. Wisconsin Employment Relations Board, 340 U.S. 416, 418, 95 L. ed. 389, 391, 71 S. Ct. 373. We cannot underscore this principle too heavily. We have no business in giving any expression of views on the merits, even in hinting one way or another. * * *"

Whether a thing be moot or not is determinable by this Court and certainly insofar as civil contempt is concerned, the controversy has disappeared. *United States* v. *United Mine Workers*, 330 U.S. 258, 91 L. ed. 884. This would leave only a possible criminal contempt and between the Nation, as a sovereign, and the State, as a sovereign, their sovereignty precludes the doing of wrong, as was declared in *Collector* v. *Day*, 78 U.S. 113, 20 L. ed. 122, 126:

> "* * * It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities

of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. * * *"

This was re-affirmed in *Graves* v. *New York*, 306 U.S. 466, 83 L. ed. 927, as to the instrumentalities.

If, therefore, the United States may punish the State by unlawfully impeaching, pauperizing and imprisoning the Governor, with deference, we need not wait for Communism to destroy our great Constitution. Let us not forget *Texas* v. *White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, wherein Mr. Chief Justice Chase said:

> "Not only, therefore, can there be no loss of separate and independent autonomy of the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."

Respectfully submitted,

JOE T. PATTERSON,
Attorney General of the State
of Mississippi,
New State Capitol Building,
Jackson, Mississippi.

September, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible].

No. 107

UNITED STATES OF AMERICA,

vs.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

PETITION FOR REHEARING

JOE T. PATTERSON, *Attorney General*
DUGAS SHARP
Assistant Attorney General
GARNER W. GREEN
MALCOLM B. MONTGOMERY
PAUL B. SMITH
M. M. ROBERTS
JOSHUA GREEN
CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi
Special Assistant Attorneys General of the State of Mississippi
Attorneys for Defendants

R. L. Mitchell Co., Inc., 1120 Oak Street, Kansas City, Mo. 64106, Harrison 1-8900

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IN THE

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OCTOBER TERM, 1963.

No. 107

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vs.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

PETITION FOR REHEARING

INTRODUCTORY STATEMENT

Records disclose that as to Petitions for Rehearing it truly may be apt to paraphrase—many are filed but few are granted. However, the rules of this Court still provide office for such a Petition. Its importance is not to be underestimated, for history is as unsparing of this Court as of any other important institution when the brilliant light of hindsight records for the future. The Defendants respectfully submit that the opinion of the Court is not yet the perfect jewel which it ought to be. Hence we beg the Court's indulgence and careful consideration of this petition.

This petition is principally based on the content, meaning and procedural significance of Footnote 12 to the majority opinion. This note ended in the following language:

> "However, our cases have indicated that, *irrespective of the severity of the offense*, the severity of the penalty imposed, a matter not raised in this certification, might entitle a defendant to the benefit of a jury trial. In view of the impending contempt hearing, *effective administration of justice* requires that this dictum be added: Some members of the Court are of the view that, *without regard to the seriousness of the offense*, punishment by summary trial without a jury would be *constitutionally* limited to that penalty provided for petty offenses."
>
> (Emphasis in quotations is added.)

For brevity's sake, this quotation will be referred to hereinafter as Footnote 12.

I.

A Decision As to Jurisdiction Is Prerequisite to Any Other Determination Herein

This Court declared herein, *inter alia*, that there should be "effective judicial administration".[1] The Court of Appeals, after considering many issues, certified the question presented, pursuant to § 1254(3), Title 28, *U.S.C.* Appended thereto were the opinions of the eight judges on the Circuit Court. These opinions sharply present whether or not the Court of Appeals had jurisdiction to certify in manner and form as it did. If it be that the Court of Appeals was without jurisdiction to certify this question, then it is requisite that this Court finally dispose of this

1. Compare *New York Times* v. *Sullivan*, ... U.S. ....., 11 L. Ed. 2d 686. Furthermore, "Interest reipublicae ut sit finis litum". Broom's Legal Maxims, pp. 331, 343.

cause by discharging contemners or remand the cause to the District Court wherein it originated, as was done in *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16.[2]

As to jurisdiction, this Court has said[3]:

> ". . . but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it. . . ."[4]

If the Court of Appeals is without jurisdiction as to this case and on the re-trial the alleged contemners were convicted, they would be entitled, after such an ordeal, to have this Court establish on the subsequent appeal that the jury trial was but a sham. Under § 1254(3), Title 28, *U.S.C.*, the question certified certainly ought to be such as that the answer will be binding and controlling upon the Court of Appeals and not a shadow without substance.

With deference, we request that the Court be mindful of the chaos which would arise if there were to be a Court of Appeals trial, with or without a jury, and a conviction;

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2. See also *Shenandoah Broadcasting* v. *A.S.C.A.P.*, U.S. , 11 L. Ed. 2d 467, 469.

3. *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U.S. 379, 382.

4. Approved in *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17.

and thereafter this Court should find that the exclusive right thus to punish was in the District Court. The schedules of this Court and the Court of Appeals demand that at least that modicum of construction accorded to statutory problems be accorded to the Court's decision here, so as to clarify the basic jurisdictional issue.[5]

Certainly this Court is in a better position to determine jurisdiction than is the Court of Appeals, which directed the bringing of the charges here.[6] *Effective judicial administration* requires that this Court determine jurisdiction *now* so that this case can be properly and effectively dealt with on the remand.

II.

The Court Erred in Its Application of the Petty Offense Analogy to the Case Before the Court

Two or more un-named members of the Court have expressed in Footnote 12 the hitherto unannounced view that a constitutional relationship exists between "petty offenses" and criminal contempts as exceptions to Article III, Section 2, Clause 3, and the 6th Amendment. We respectfully submit that such a view is completely logical and correct *if followed to its conclusion*. Such an analogy points the way to a meaningful and proper solution to a constitutional hiatus which has troubled this Court for many years.

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5. Cf. *Costello* v. *Immigration & Naturalization Service*, ___ U.S. ___, 11 L. Ed. 2d 559.

6. Cf. Mr. Justice Frankfurter's concurring opinion in *U. S.* v. *United Mine Workers*, 330 U.S. 258, 308, wherein he stated:

> ". . . No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide."

As the Federal Government has grown, the Executive Department has placed increasing responsibility on the judicial system, not only by the constant numerical expansion of laws which the courts are called on to enforce through regular processes but by providing for enforcement through injunctive proceedings in many new situations. Thus the work of the courts has grown both materially and in complexity. The simple contempts of colonial days, illustrated in the appendices to the opinions here, have been displaced in part by the more serious and far-reaching matters illustrated by the *United Mine Workers* case[7] and the present litigation. If constitutional limitations are to be evenly applied, then the same rules which have so long and successfully governed "petty offenses" may equally solve the problem of according criminal contempt procedures their constitutional due.

There is no authority to support the view that summary proceedings were ever available in "petty offense" cases as a matter of constitutional right "*irrespective of the severity of the offense*". The judicial history of the development of the petty offense exception to the Constitution is completely and clearly to the contrary.

In an article entitled "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury", 39 *Harv. L. Rev.* 917, Professors Frankfurter and Corcoran made extensive examinations into colonial legislation and court records. Their conclusions after this examination were:

> "The evidence has been summarized to indicate the common-law history of penal legislation which dispensed with the jury. Both in England and in the colonies a clear and unbroken practice—despite all uncertainties and reservations—emerges for two centuries preceding the Constitution. Many offenses were

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7. *Supra*, Note 6.

customarily tried solely by magistrates. These offenses were compendiously characterized as 'petty'. But pettiness was not a rigidly fixed conception; demarcation between resort to jury trial and its dispensation was not mechanical. In subjecting certain conduct to the summary procedure of magistrates, unguarded by the popular element, *there was an exercise of moral judgment dividing behavior into serious affairs and minor misdeeds.* The gravity of danger to the community from the misconduct largely guided the moral judgment; the wide repetition of the act, raising practical problems of enforcement, in part influenced the moral value which the community attached to the act. *The apportioned punishment was both a consequence of the minor quality of the misconduct and an index of the community's moral judgment upon it.* Broadly speaking, acts were dealt with summarily *which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light.* These general tendencies, both in England and in the colonies, represent the history absorbed by the Constitution . . . *We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not.*"

In the case of *Katz* v. *Eldredge*, 97 N.J.L. 123, 117 Atl. 841, Mr. Justice White, writing for the New Jersey Court, made the following remarks:

"'I think the real underlying historically established test *depends upon the character of the offence involved rather than upon the penalty imposed.* The offence must be a petty and trivial violation of regulations established under the police power of the state in order that the offender may be summarily tried, convicted, and punished without indictment by a grand jury and without trial by a petit jury. It must, of course, be assumed that the punishment for such a petty and trivial offence will also be comparatively petty and trivial, otherwise it would violate another

provision of the state constitution which prohibits cruel and unusual punishments. But, assuming that the punishment will bear proper relation to the seriousness of the offence, the theory, as I understand it, which gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of *petty and trivial police power regulations* are more important than the *comparatively small prejudice to the individual* resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer. This, of course, is the converse of the rule with regard to *serious offences*, crimes and misdemeanors, where, for the preservation of the liberties of the people, the security afforded the individual by his right to trial by jury is more important than the mere convenience of the public arising from a speedy and inexpensive summary trial.'"

All of this Court's holdings on this subject are to the same effect.[8]

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8. In *Callan* v. *Wilson*, 127 U.S. 540, the Court considered an appeal from the Supreme Court of the District of Columbia on a Writ of Habeas Corpus. The petitioner was charged with conspiring to refuse to work as a musician in connection with an organizational dispute involving the Knights of Labor of America. The sentence imposed was a fine of $25.00 with a proviso that if default was made in its payment, petitioner was to be imprisoned for 30 days. No jury was accorded despite the petitioner's demand. This Court reversed the case. The first Mr. Justice Harlan, speaking for the Court, began its opinion thus:

> "It is contended by the appellant that the constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court.
>
> * * *

Perhaps the most persuasive single case for the granting of the rehearing sought is *District of Columbia* v. *Colts*, 282 U.S. 63, where the defendant was charged with recklessly driving a motor vehicle at a greater rate of speed than 22 miles an hour and in such a manner and condition as to endanger property and individuals, which was a statutory offense that carried a petty first offense penalty of a $25.00 to $100.00 fine or a 10 to 30 day jail term. The Court, in a unanimous opinion by Mr. Justice Sutherland, adopted the same view expressed by the New Jersey Court in *Katz* v. *Eldredge, supra*. The Court stated:

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, *depends primarily upon the nature of the offense*. The offense here charged is not merely malum prohibitum, but in its very nature is malum in se."

The opinion concluded:

> "An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities

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"Without further reference to the authorities, and conceding that there is a class of *petty or minor offenses not usually embraced in public criminal statutes*, and not of the class or grade triable at common law by a jury, and which, if committed in this district, may, under the authority of Congress, be tried by the court and without a jury, we are of the opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his co-defendants is by no means a petty or trivial offense."

Next, in the case of *Natal* v. *Louisiana*, 139 U.S. 621, the court affirmed a non-jury proceeding in which Natal was convicted of violation of a New Orleans city ordinance related to the place of keeping a public market. The ordinance penalty was identical to the one involved in the *Callan* case.

In *Schick* v. *U. S.*, 195 U.S. 65, the court affirmed a summary conviction for violation of a minor provision of the United States act making it a misdemeanor to purchase or sell unbranded oleomargarine. The act provided for a maximum fine of $50.00.

> brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense . . . Such an act properly cannot be described otherwise than as a grave offense—a crime within the meaning of the third article of the Constitution—and as such within the constitutional guarantee of trial by jury."

In the cited case of *District of Columbia* v. *Clawans*, 300 U.S. 617, the Court demonstrated at the outset of its opinion that the offense there involved, namely, selling unused railway excursion tickets without a license, was at most but an infringement of local police regulations and was of a moral quality that was relatively inoffensive.

The rationale of the exhaustive research reflected in the law review article and the above decisions is that the Constitution intended, both by Article III, Section 2, Clause 3, and the 6th Amendment, to make it impossible for summary criminal proceedings to convict a citizen of a criminal offense which could stigmatize him with guilt of an offense contrary to the fundamental moral purposes of the community or which would endanger society.

The development of our society and its complicated interrelations of men, governments and the courts demand that this court *in this case* take a searching new look at what fundamental constitutional restrictions mean in the field of criminal contempt. It is no longer sufficient to justify the denial of that precious birthright of free men—trial by jury—by pointing to the pages of old reports, from another time and age involving an offense lightly regarded by community standards, the conviction of which was a matter of comparatively small prejudice to the individual.

Because of changed conditions, *those cases are no longer in point.*

Mr. Justice Goldberg's review of the increasing penalties imposed in criminal contempt cases[9] vividly demonstrates—not that courts are becoming unjust in punishments they mete out—but that the inherent nature of the offenses involved in many such cases is more severe. There are many present-day cases of criminal contempt which are not the trival or petty matters dealt with by the Common Law colonial courts.

If the criminal offense charged here consisted of failure to obey an order of a municipal court to keep off the grass, the limited analogy of Footnote 12 might be well taken. But the offense charged here is a much more grievous one. Here, we have the two men holding the highest positions of trust within a sovereign state, charged with a crime which could brand them as being felonious, with a corresponding discredit, not only to them as individuals, but to their State. Its unquestioned equivalent in statutory crime carries a penalty of one year's imprisonment and a fine of $1,000.00. Under the analogy which exists between the constitutionally required treatment of petty offenses and contempts of court, every precept of logic requires that the major substance of the analogy must also govern the court's decision—not solely the minor corollary thereof.

The Court, in this field of criminal contempt, has too long been bound by precedents of doubtful historicity and a hesitancy to make any rule which might lessen the "efficiency" of contempt procedures designed to obtain compliance with court orders. Summary *civil* contempt procedures, which are in nowise affected hereby, will ade-

9. See Section B, thereof and the cases cited therein.

quately prevent any breakdown of judicial authority and will eliminate any likelihood that an obstinate juror will thwart the will or decree of a court.

When history looks back at this opinion it should not write of it as a minor step in the direction of compliance with constitutional mandates, but that said should stand boldly forth as the point of departure from the rote of arbitrary denial of a basic constitutional right in cases of criminal contempt *"regardless of the seriousness of the offense"*.

III.

In View of the Doubt, Naturally Arising, Where Eight Judges Have Held Defendants Entitled to a Trial by Jury As a Matter of Right and Only Nine Judges Have Held to the Contrary, Judicial Discretion Indicates That a Jury Trial Should Be Granted

The members of this great Court, far better than we as lawyers, realize that the history of this case will stand as a voice forever sounding across the centuries as a part of the law of right and wrong. The importance of the principles of liberty and governmental relations here involved behooves the Court to now look back on what has happened and determine whether such retrospection gratifies the mind and soothes the conscience.

When the matter was before the Court of Appeals for determination, it was heard and decided by eight most able justices. Four of these members of the Court were of the opinion that under the Constitution and the law as written, the defendants are entitled to a trial by jury, and four were of the opinion that the defendants were not entitled to trial by jury *as a matter of right*. Hence, the question was certified here.

When the question was first considered by this Supreme Court, four of its eminent Judges were of the opinion that the defendants are entitled to a trial by jury, and five of its eminent Judges were of the opinion that defendants are not entitled to a trial by jury *as a matter of right*.

Seventeen jurists, skilled and learned in the law, showing by their diligence a sincerity made manifest by a mere reading of their written opinions, have studied and written upon this record. Eight of these minds have placed themselves on record as being of the opinion that these defendants are entitled to a trial by jury, while only nine have decided that the defendants here are not entitled to a trial by jury *as a matter of right*. Surely it must be conceded in the face of such record that the demand of these defendants to a trial by jury, as a matter of right, poses a serious question; in determining which, reasonable minds must and do differ.

But the facts of this case do not end there. There were among the five eminent Justices joining in the majority opinion, some who were of the opinion that if perchance the Court of Appeals, on remand, should by summary trial impose more than a trivial penalty on the defendants, then that action would in and of itself entitle the defendants to a trial by jury *as a matter of constitutional right*. In expressing this view the majority of this Honorable Court caused Footnote 12 to be added to their opinion.

Thus, retrospection reveals that eight Judges held the defendants to be entitled to a trial by jury as a matter of right without qualification, and nine held that the defendants are entitled to a trial by jury as a matter of right, in the event the Court of Appeals should require the imposition of a penalty in excess of that provided for petty offenses.

This Court has repeatedly held that Constitutional provisions for the security of persons and property are to be liberally construed, and it is the duty of the Courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachment thereon.[10]

Constitutional Rights of persons as contrasted with property rights occupy a preferred position,[11] and Constitutional guarantees of personal rights are to be largely and liberally construed in favor of the citizen.[12] The rules demand a liberal construction in favor of the citizen. Any doubt inherent in such a situation should surely come in at the window even if denied at the door. Uncertain ways are unsafe ways and doubt is a greater mischief than despair. Denial of a Constitutional right because of a doubt in the mind of one Justice out of seventeen as to the right of a citizen to its protection, is, we fear, a far cry from the protected so solemnly vouchsafed.

We are not unmindful that any six Justices constitute a quorum,[13] nor do we overlook the fact that a bare majority of the Justices is sufficient for the decision of cases. But when the decision of the question has become so close that a one-seventeenth majority determines it, we respectfully submit that such a record should give rise to a presumption of a right to the exercise of a judicial discretion. The grant of the right would be more requisite and ap-

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10. *Boyd* v. *U. S.*; 116 U.S. 616, 635; *Gouled* v. *U. S.*, 255 U.S. 304; *Byars* v. *United States*, 273 U.S. 28. Cf. also Mr. Justice Black's opinion here and the cases cited in Note 2 therein.

11. *Marsh* v. *State of Alabama*, 326 U.S. 501, 66 S. Ct. 276; *Hall et al.* v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533.

12. *U. S.* v. *Commanding General*, 69 F. Supp. 661; *Gulf, Colorado & Sante Fe Ry. Co.* v. *Ellis*, 175 U.S. 150; 11 *Am. Jur.*, p. 670, §59, and numerous cases there cited.

13. Title 28, *U.S.C.* 1.

propriate than to close the eyes of the Court to the possible miscarriage of such a Constitutional guaranty and thus, by the authority of so small a majority, destroy it.

In this case, isn't it apropos for the Court to say that where such grave doubt exists judicial discretion should be exercised and a basic Constitutional guaranty liberally construed in favor of the citizen who invokes it?

The valid exercise of "judicial discretion" connotes the exercise of the reason and conscience of the Judge to affect a just result, taking account of the law *and the particular circumstances of the case.*[14] It is the power of the Court to determine questions on fair judicial consideration, with regard to what is right and equitable under law and circumstances and directed by reason and conscience to just result.[15] It is the equitable decision of what is just and proper under the circumstances.[16] As was said by Justice Stone in his dissenting opinion in *United States* v. *Butler*, 297 U.S. 1:

> "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

The narrow compass of human wisdom and the cases recorded in the books, do not and cannot embrace all of the possible situations that may arise. Hence cases never before considered, such as the case at bar, often present themselves and will continue to do so. For these, we sub-

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14. *Brandon* v. *Board of Commissioners*, 124 N.J.L. 135, 11 A.2d 304, 311.

15. *Schneider* v. *Hawkins*, 179 Md. 21, 16 A.2d 861, 864.

16. *Nielson* v. *Superior Court for Thurston County*, 7 Wash. 2d 562, 110 P.2d 645, 647.

mit with deference, the decision must be according to discretion and conscience—not according to the hard, strict letter of the law but according to a generous and sympathetic feel of all of the circumstances in the light of things germane to the experiences of mankind collectively, and the sanctity of Constitutional rights.

History looks over the shoulder of the Court, and freedom stands with bated breath as it listens for its answer. Justice and equity stand in awe lest this great Court fail to render to these defendants their fullest due by extending to them that recognition of the key to justice, known to the law as "Judicial Discretion", and made available to the Court out of the experiences of mankind for the express purpose of enabling the Court to do what is right and equitable under the law and the circumstances and directed by reason and conscience, but which is not and cannot be governed by any fixed principles or rules.[17]

IV.

If Left Standing Unclarified, the Optional Procedure Demanded by the Court's Dictum Deprives the Defendants in This Case of Due Process of Law

Due process has come to mean that both the procedure followed and the substance of a thing done by the United States which deprives a person of life, liberty or property must accord with a community-wide sense of fair play.[18] Most often the yardstick of due process is used to admeasure the constitutional validity of legislative enactments or exercise of executive police authority, but its applicability

17. *Rowley* v. *Beuthuysen*, 16 Wend. (N.Y.) 369, 378.

18. *Galvan* v. *Press*, 347 U.S. 522; *Breithaupt* v. *Abram*, 352 U.S. 432. Cf. Corwin's, *The Constitution of the United States*, p. 844, *et seq.*

to judicial proceedings has long been engrained in the decisional law of this court.[19]

By Footnote 12, the Court of Appeals is admonished that a majority of the judges of this Court have determined that the Constitution requires that only the punishment applicable to petty offenses can be meted out to these defendants if they are convicted, where their trial proceeds contrary to the demands of the 6th Amendment and Article III, Section 2, Clause 3.

But when is appropriate punishment to be determined? Does the dictum contemplate that the trial would be commenced before a constitutional jury, proof taken and at the conclusion thereof the judges could then determine to discharge the jury and inflict petty offense punishment? Could the court proceed without a jury and, having heard the evidence, make a determination that the offense was proven to the court's satisfaction but that the appropriate degree of punishment transcended that permitted for petty offenses and then, after an obvious determination of guilt, start the proceedings anew with a jury present? If the Constitution is thought to require a jury, is the jury to be chosen from the vicinage of the district where the alleged offense was committed, as the 6th Amendment requires?[20] Effective judicial administration connotes neither doubt nor darkness but certainty and light.

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19. *Pennoyer* v. *Neff*, 95 U.S. 714, 733.

20. Indeed it might even be asked if the question of appropriate punishment is any longer an open one insofar as the Court of Appeals and these defendants in this case are concerned, in the light of the severe sanctions previously imposed in this same case, especially when it is considered that the Court imposed both fines and imprisonment upon the defendants. Cf. 18 *U.S.C.A.* 401, and *In re Bradley*, 318 U.S. 50.

We respectfully submit that the lack of a clear answer to the foregoing questions leaves this case in a posture of vagueness as to the procedural due of the defendants here, which violates the guarantees of the 5th Amendment. The court has recently spoken in a meaningful way of an analogous problem. In the case of *Cramp* v. *Board of Public Institutions of Orange County, Fla.*, 368 U.S. 278, the court refused to permit Cramp to be discharged as a public school teacher because of his refusal to execute a non-communist oath. In the course of its opinion, the court stated:

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U.S. 174, 176, 73 S. Ct. 189, 190, 97 L. Ed. 200. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 243, 52 S. Ct. 559, 568, 76 L. Ed. 1062."

The fact that the Circuit Court of Appeals below might declare it would irrevocably commit itself to the selection of one option or the other in advance of this particular trial, so as to avoid impermissible vagueness, would not cure the error inherent in the court's requirement.[21]

No critical appraisal of the conduct with which the defendants stand charged can obscure their right to demand constitutional clarity in the procedures to be followed. In the case of *Chessman* v. *Teets*, 354 U.S. 156, this court, *after denying certiorari on five previous occasions*, stated:

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

We respectfully submit that the Constitution requires that the offense charged to constitute a criminal contempt, and not the resultant appropriate punishment which prop-

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21. Cf. *Lanzetta et al.* v. *State of New Jersey*, 306 U.S. 451.

erly can only be determined *after* a conviction, must be held to control the defendants' constitutional right or lack of it to a jury trial of the charges made by the Court below.

CONCLUSION

For each and all of the reasons set out aforesaid, the Court should grant this petition and upon a rehearing hereof should (a) declare that the exclusive jurisdiction of this cause is in the District Court of the District where the alleged contemptuous acts were committed, and (b) require that this case proceed only by way of a trial by a constitutionally composed jury through the exercise of judicial discretion or as of right.

Respectfully submitted,

JOE T. PATTERSON, *Attorney General*
DUGAS SHANDS
Assistant Attorney General
GARNER W. GREEN
MALCOLM B. MONTGOMERY
FRED B. SMITH
M. M. ROBERTS
JOSHUA GREEN

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi
Special Assistant Attorneys General of the State of Mississippi, Attorneys for Defendants

May, 1964.

semblies never broached the subject so far as we can determine.

Mr. Justice Black characterizes summary criminal contempt power thus:

> "Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of *not unwilling judges*, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society."

Lord Chesterfield reflected the knowledge and judgment of many a common man when he said, "There are misers of money but none of power." With deference, Defendants suggest that if "Justice must satisfy the appearance of justice,"[23] our judicial system would be better off if it exercised this "necessity" along lines which more clearly avoid the appearance of injustice, wherever possible, and that indirect contempt such as here alleged, which are the subject statutorily defined crimes, present such a possibility.

Since the date of the *Green* case, several Law Journals have carried articles discussing the status of criminal contempt procedures. The most elaborate of these articles is entitled, "The Constitution and Contempt of Court" by Ronald Goldfarb.[24] Perhaps Mr. Goldfarb's views can be best summarized by this paragraph from his articles:

> "When a man is deprived of his property or liberty as punishment for commission or omission of an act which is proscribed by society, for whatever reason, he

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23. *Offutt* v. *U. S.*, 348 U.S. 11.

24. 61 *Michigan L. Rev.* 283 (Dec. 1962).

> is treated as a criminal. In contempt cases there are no reasons strong enough to override the long and well-established policies guaranteeing the right to be tried by a jury, after indictment, and in the ordinary course of the law. The Constitution is quite clear in its directives in this respect. The policies involved go to support, at least in comparative value, the Constitution's implications."

The prosecution here urges this court to cleave to "the *traditional* law of contempt." What a startling position for a government of limited powers to take! How can they forget to *insist* that this court is bound to follow only the *Constitutional* law of contempt?

Should a determination to see these defendants punished with "efficiency" and free from the "hazard" of acquittal prevail over constitutional restraints, the words of the Chief Justice of the United States in his dissent in *Brown v. United States*,[25] concerning a failure to follow the minimum procedural requirements of Rule 42(b), may become even more prophetic.

> "Unfortunately, the failure to adhere to procedural regularity may be glossed over in the investigation of matters of burning public interest, but it should be remembered that the deprivation of the rights of a witness in such an investigation must apply as a precedent to people in all walks of life, both good and bad. I suggest that the full import of the decision in this case will not be recognized until it is applied at some future time in other types of investigations and to other people."

Certainly no better conclusion could be written to this point than in the very words of Mr. Justice Black.

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25. 359 U.S. 41, 63.

"The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. • • •

"In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is concerned. There is not valid reason why they should be singled out for an extraordinary and essentially arbitrary mode of enforcement. *Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth.* In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt."

D

The Ninth and Tenth Amendments Prohibit Any Implied Delegation of Power to Federal Courts to Punish Criminal Contempt Without a Constitutional Trial by Jury

This Court has often held that the Union emanated from the people.[1]

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1. *McCullough v. Maryland*, 4 Wheat. 316, 404, 5.

"The government of the Union then is emphatically and truly a government of the people. In form and in substance

After the Constitution recited that "the trial of all Crimes, except in *Cases of Impeachment*, shall be by jury," and "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," the people insisted on stating: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[2] Wherein is to be found a conveyance by the people of power to criminally punish any citizen without a jury trial, *except in "Cases of impeachment"?*

E

The Observance of Constitutional Safeguards in Criminal Contempt Is Becoming Increasingly Important

A former Chief Justice of the United States, Melville Fuller of Illinois, before he became head of the bench, remarked of a reforming member of the Chicago Bar: "Brother B would codify all laws in an act of two sections: 1st, all people must be good; 2nd, Courts of Equity are hereby given full power and authority to enforce the provisions of this act."

Query: Is this ridiculous and implausible?

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it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. This government is acknowledged by all to be one of enumerated powers."

Martin v. *Hunters Lessee*, 1 Wheat. 304, 324.

"The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically as the preamble declares, by 'the people of the U. S.'"

2. 9th Amendment. The 10th Amendment is as express a retention of undelegated powers as the 9th. "The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people." (See Appendix, p. A1.)

Answer: There are now at least 29 instances in which Congress has authorized Courts of Equity to restrain legislatively declared public wrongs.[1]

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1. Antitrust laws, restraining violation (by U. S. attorney, under direction Attorney General) (15 U.S.C. 4).

Associations engaged in catching and marketing aquatic products restrained from violating order to cease and desist monopolizing trade (by Department of Justice) (15 U.S.C. 522).

Association of producers of agricultural products from restraining trade (by Department of Justice) (7 U.S.C. 292).

Atomic Energy Act, enjoining violation of act or regulation (by Atomic Energy Commission) (by Attorney General) (42 U.S.C. 1816).

Bridges over navigable waters, injunction to enforce removal of bridge violating act as to alteration of bridges (by Attorney General) (33 U.S.C. 519).

Civil Rights Act of 1957 (by Attorney General) (42 U.S.C. 1971).

Clayton Act, violation of enjoined (U. S. attorney, under direction of Attorney General) (15 U.S.C. 25).

Electric utility companies, compliance with law enforced by injunctions (by Federal Power Commission) (16 U.S.C. 825m).

False advertisements, dissemination enjoined (by Federal Trade Commission) (15 U.S.C. 53).

Freight forwarders, enforcement of laws, orders, rules, etc., by injunctions (by Interstate Commerce Commission or Attorney General) (49 U.S.C. 1017).

Fur Products Labeling Act, to enjoin violation (by Federal Trade Commission) (15 U.S.C. 69g).

Enclosure of public lands, enjoining violation (by U. S. attorney) (43 U.S.C. 1062).

Investment advisers, violations of statute, rules and regulations governing, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80b-9).

Gross misconduct or gross abuse of trust by investment companies, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80a-35).

Use of misleading name or title by investment company, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80a-34).

F
Conclusion

With deference, we submit, the time has come and now is when this Court should make the searching reappraisal of these "boundless expedients" called for by the Constitutional dissent in *Green*. *Constitutional precepts*

Violation of statute governing, or rules, regulations, or orders of SEC by investment companies, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80a-41).

Fair Labor Standards Act, enjoining of violations (by Administrator, Wage and Hour Division, Department of Labor, under direction of Attorney General, see 29 U.S.C. (204b)) (29 U.S.C. 216 (c), 217).

Longshoremen's and Harbor Workers' Compensation Act, enforcement of order by injunction (by United States attorney, see 20 U.S.C. 921a) (33 U.S.C. 921).

Import trade, prevention of restraint by injunction (by United States attorney, under direction of Attorney General) (15 U.S.C. 9).

Wool products, enjoining violation of labeling act (by Federal Trade Commission) (15 U.S.C. 68e).

Securities Act, actions to restrain violations (by Securities and Exchange Commission) (15 U.S.C. 77t).

Securities Exchange Act, restraint of violations (by Securities and Exchange Commission) (15 U.S.C. 78u).

Stockyards, injunction to enforce order of Secretary of Agriculture (by Attorney General). (7 U.S.C. 216).

Submarine cables, to enjoin landing or operation (by the United States) (47 U.S.C. 36).

Sugar quota, to restrain violations (by United States attorney under direction of Attorney General, see 7 U.S.C. 608 (7)) (7 U.S.C. 608a-6).

Water carriers in interstate and foreign commerce, injunctions for violations of orders of ICC (by ICC or Attorney General) (49 U.S.C. 916).

Flammable Fabrics Act, to enjoin violations (by Federal Trade Commission) (15 U.S.C. 1195).

National Housing Act, injunction against violation (by Attorney General) (12 U.S.C. 1731b).

demand observance not temporization. If this is not done, we could one day find, as counsel for Eugene Debs speculated, a court injunction being read to halt an advancing army of irate citizens. Certainly, every man longs to live with a sense of security in a rational freedom, in a nation where laws are dictated by the common weal and obeyed by common consent. *Judicial review has survived because it articulates a decent respect for the opinions of mankind.* This is the very essence of the rule of law. History and common sense teach that the public's respect for the Judiciary has never been enhanced by its "efficiency", but only by its Judges knowing Justice, and her blind.

POINT II

Defendants Are Entitled to a Trial by Jury under the Statutes of the United States

A

The Pertinent Statutes, 18 U.S.C., Sec. 402, and Sec. 3691, Plainly Grant to the Defendants the Right of Trial by Jury

After the remand of the Meredith case to the District Court, the Court of Appeals recalled its mandate then directed the District Court to grant all relief prayed for and to issue a permanent mandatory injunction enjoining the admission of Meredith to the University. At the same time and in the same order the Court of Appeals issued its own injunction of identical effect.

On September 13, 1962, the District Court issued its injunction incorporating the mandate of the Court of Appeals and all of the terms of the injunction of that Court.

Both the injunction issued by the Court of Appeals and the injunction issued by the District Court being

identical in their terms, a violation or disobedience of the one must necessarily be a violation of the other. Hence, the actions charged against the defendants, if true, were in disobedience of the Writ of the United States District Court as well as the Writ of the Court of Appeals and necessarily would fall within the provisions of Rule 42 (b) of the Rules of Criminal Procedure and Sections 402 and 3691, the pertinent parts of which are set out in the margin.[1]

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1. Rule 42 (b), *Rules of Criminal Procedure:*

The defendant is entitled to a trial by jury in any case in which an act of Congress so provides.

Section 402, Title 18, *U.S.C.*

Sec. 402. Contempts constituting crimes.

"Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States *or any court of the District of Columbia*, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Section 3691, Title 18, *U.S.C.*

"Sec. 3691. Jury trial of criminal contempts.

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States."

Section 402 provides that it applies to any person wilfully disobeying any lawful order "of any district court of the United States *or any Court of the District of Columbia* * * *"

Nine Circuit Courts of Appeal were established on March 3, 1891.[2] The Court of Appeals for the District of Columbia was established as an Appellate Court in the District of Columbia on February 9, 1893.[3] On March 3, 1911, Congress continued the existence of nine Circuit Courts of Appeal and did not expressly include the Court of Appeals of the District of Columbia as one of them.[4] However, on March 19, 1928, the United States Supreme Court, in *Swift & Co. et al.* v. *U. S.*[5] held that the Court of Appeals of the District of Columbia was a Circuit Court of Appeals. Then in 1940 Congress passed an Act[6] providing:

> "For the purposes of Secs. 17-23 of this Title the District of Columbia shall be deemed to be a judicial Circuit",

and on June 25, 1948, it passed[7] an Act affirmatively establishing the Court of Appeals of the District of Columbia as a Court of Appeals of the United States.

The Clayton Act was enacted on October 13, 1914. Its Section 21 was almost identical to the first paragraph of 18 *U.S.C.* 402.[8]

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2. 26 Stat. 826.
3. 27 Stat. 434.
4. 36 Stat. 1131.
5. 276 U.S. 311. See also Historical and Revision Notes, 28 *U.S.C.*, § 41, pp. 314, 5.
6. Title 28, U.S.C.A. § 17 (1940 edition).
7. 62 Stat. 870.
8. "That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court

Section 23 of this Act made the disobedience of any lawful Writ of any District Court of the United States or any Court of the District of Columbia triable by a jury, upon demand of the accused.[9]

When the Clayton Act was passed on October 15, 1914, the Court of Appeals of the District of Columbia was not specifically declared to be one of the nine United States Courts of Appeal, but it became such a regular Court of Appeals upon being so declared by the Supreme Court in *Swift & Company et al.* v. *U. S.*,[10] on March 19, 1928, upon being incorporated in the regulatory acts of Congress in 1940 by §17, and on June 25, 1948, by affirmative Act of Congress.

On June 25, 1948, when 18 U.S.C., §402, was made the law, there was in existence a Court of Appeals in the District of Columbia of the same timber, powers, and jurisdiction as the Court of Appeals of the Fifth Circuit, which former Court had been so recognized for more than 20 years by decision and for more than eight years by implicit statutory declaration.

While Section 3691 provides for disobedience of writs of a District Court only, Section 402 creates the *substantive* jurisdictional law governing trials for contempt. Hence,

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of the United States *or any court of the District of Columbia* by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided." 38 Stat. 730.

9. "In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."

10. *Supra*, p. 40.

it is not important that Section 3691 provides as to trials of contempt of District Court orders alone, because Section 3691 is referred to solely to establish the procedural machinery for the trial, it does not grant the substantive right of trial by jury in this case.

If an act was a wilful violation of any Court order of the District of Columbia between private litigants and said act was a violation also of a statute of the United States it would beyond dispute be triable before a jury. If it would be triable before a jury if it had occurred in the District of Columbia, the American standard of justice and fair play will not permit a person to be denied a jury trial for disobedience of an order of the Court of Appeals for the Fifth Circuit. This would be the most manifest of discriminations.

The Court has construed the due process clause of the 14th Amendment to prohibit discrimination by states in the field of property taxation;[11] discrimination by states in the exercise of police power between billboard and newspaper advertising;[12] discrimination among milk dealers;[13] and in many other cases.

The due process provisions of the 5th Amendment are binding on the United States just as the provisions of the 14th Amendment are binding on the States.[14] Relying upon statutory public policy and its supervisory authority over Federal Courts, this Court has reached results under the due process clause of the Fifth Amendment similar to those arrived at under the equal protection clause of the Fourteenth Amendment in refusing to enforce dis-

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11. *Bells Gap. R. Co. v. Pennsylvania*, 134 U.S. 232, 237.

12. *Packer Corp. v. Utah*, 285 U.S. 105.

13. *Mayflower Farms v. Ten Eyck*, 297 U.S. 266.

14. *Scott v. Sandford*, 19 How. 393, 450.

criminatory restrictive covenants in the District of Columbia;[15] in reversing a judgment of a Federal District Court because of discriminatory exclusion of day laborers from the jury panel;[16] and in construing the railway labor act to require a collective bargaining representative to act for the benefit of all members of the craft without discrimination on account of race.[17]

To construe Section 402 to provide for a trial by jury for the disobedience of a Writ of the Court of Appeals in the District of Columbia and to deny a trial by jury for the disobedience of a like Writ of the Court of Appeals for the Fifth Circuit under identical circumstances would be equally a discrimination.

If the "threatened" acts of these defendants were prospective disobediences of the Writ of the Court of Appeals, they would also be identical disobediences of the identical Writ of the District Court. Yet, neither the private litigant nor the *amicus* filed any proceedings in the District Court where, on demand by defendants, a jury trial was mandatory. The *amicus* instead went to the Court of Appeals and thereby claims to have achieved a complete, twice-reinforced denial of the right of defendants to a jury trial. The prosecution should not be held to have the choice to thus deprive these defendants of a right to a jury trial for the same identical alleged offense by the subterfuge of bypassing the District Court and applying to the Court of Appeals for relief of an original nature in a court of purely appellate jurisdiction or by unlawfully intervening in private litigation. However, we feel sure this Court

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15. *Hurd* v. *Hodge*, 334 U.S. 24.

16. *Thiel* v. *So. Pac. Co.*, 328 U.S. 217.

17. *Steele* v. *L. & N. R. Co.*, 323 U.S. 192.
Cf. *Griffin* v. *Illinois*, *supra*, p. 15.

will not permit these defendants to be so discriminated against and their right to a jury trial under Section 402 to be taken from them by any such construction of the facts here presented.

The spirit and meaning of the law is written into Article IV, Section II of the Constitution.[18] In *Scott* v. *Sanford*,[19] it was held that this clause is a guaranty to the citizens of the different states of equal protection by Congress and binding on the National Government.

But the amicus argues that the Clayton Act referred only to District Courts and supports his argument by quoting from the Congressional record a statement made by Mr. Clayton on July 9, 1912. The amicus loses sight of the fact that this same Congressional Record[20] sets out the bill then being considered.[21]

That act did not pass. It was 2 years and 3 months later, October 15, 1914, that a new and different Clayton Act was introduced and to it had been added the language now found in Section 402, viz:

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18. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

19. *Supra*, p. 42.

20. 48 Cong. Rec. 8801.

21. In material part it read:

"Section 268 a. That any person who shall willfully disobey any lawful writ, process, order, rule, decree or command of any *District Court of the United States* by doing any act or thing therein or thereby forbidden to be done by him be of such character as to constitute also a criminal offense under any statute of the United States or at common law, shall be proceeded against for his said contempt as hereinafter provided.

"Section 268 b. * * * In all cases within the purview of this act such trial may be had by the Court, or, upon demand of the accused, by a jury * * *."

"* * * writ, process, order rule, decree or command of any District Court of the United States *or any Court of the District of Columbia.*"

To argue that the Congress in 1948 stating in Section 402

"or any Court of the District of Columbia"

did not know that the language embraced the then existent Court of Appeals of the District of Columbia is nothing short of folly.

"Any Court of the District of Columbia" includes of necessity all of the Courts of the District of Columbia.

To argue that Section 402 does not apply to the Court of Appeals is to strike from the statute its very language. To say that the statute does not apply to the Court of Appeals for the Fifth Circuit is to grant an accused in the District of Columbia a right of trial by jury and to deny to an accused in the Court of Appeals, Fifth Circuit, a right of trial by jury. Such a discrimination violates the rights against discrimination guaranteed by Article IV, Section II, and the Fifth Amendment.[22]

B

The Action in Which the Charges Were Brought Is Not an Action Brought or Prosecuted by the United States

The prosecution argues that the Court of Appeals' order of September 18, 1962,[1] authorized it to appear in an appellate court and bring or commence an original proceeding between it and the Defendants. It argues that it

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22. Cf. *Cranch* v. *Nevada*, 6 Wall. 35.

1. (C. 5.)

was "something more than an amicus", whatever that means. This argument is without merit.

This unique order was entitled "No. 19475, *James H. Meredith, Appellant* v. *Charles Dickson Fair, et al., Appellees*", a suit between private persons, and was filed in that suit—no other suit was then pending. In addition, the order itself shows that the authority of the United States to appear was limited by the language of the order only "to appear and participate as *amicus curiae in all proceedings in this Court* * * * and * * * *also before the District Court of the Southern District of Mississippi* * * *."

This voluntary entry of the United States is not authorized by any act of Congress and none is claimed by the Government.[2] Congress has not authorized the Government to enter any case such as this as a litigant and the Government does not contend otherwise. The claimed entry by the United States under the order of September 18, 1962, should not be confused with its commencement of this criminal proceeding by filing its information of December 21, 1962. The filing of the information for contempt was necessarily predicated on the alleged jurisdiction of the Court of Appeals to enter the order of September 18, 1962, authorizing the United States "to appear and participate as *amicus curiae* in all proceedings *in this action*[3] before this Court."

"This action" was brought and prosecuted by Meredith, in the name of Meredith and on behalf of Meredith. It was not brought or prosecuted by, or in the name of or on behalf of the United States.

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2. Cf. Judge Cameron's opinion. (C. 88.)

3. *James H. Meredith* v. *Charles Dickson Fair et al.*, No. 19475.

It is clear from the statute[4] that the words "brought or prosecuted in the name of, or on behalf of the United States," do not refer back to or modify the word "contempt" but clearly modify "*suit or action* brought by or prosecuted in the name of or on behalf of the United States" and which the writ, process, order, decree or command was "*entered.*"

"Brought", used in connection with a suit, means instituted, commenced. Such was long ago decided in *Berger* v. *Douglas Co. Commissioners*[5] where it was said:

> "These facts present a question of some doubt as to whether the suit was 'brought'—that is, instituted, commenced—in the district court; and if it was not, it was not removable."

In *Goldenberg* v. *Murphy*,[6] this Court held:

> "A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought'. In this connection the two words evidently mean the same thing and are used interchangeably."

Clearly the action in which the temporary restraining order and the permanent injunction were "entered" was not "brought" or "commenced" by the United States as defined in *Goldenberg* v. *Murphy, supra.*

It is well established law that the United States may appear as a litigant only when authorized to do so by

4. 18 U.S.C. 3691.

5. 5 Fed. 23, 26.

6. 108 U.S. 162.

Congress; and may invoke the jurisdiction of the Courts as plaintiff only through authorized persons.

Congress, in the passage of the "Civil Rights" Act of 1960, affirmed its knowledge that neither the United States nor the Attorney General had any right to institute any action for the United States or in the name of the United States for relief of anyone claiming to have been deprived of his right to vote because of his race, without express statutory authorization by enacting Section 1971(c) of Title 42, U.S.C.,[7] in order to establish such right pursuant to the Fifteenth Amendment in the limited field of voting rights there covered.[8]

Such a construction is not unique in the law. This Court has many times affirmed in a variety of situations that the word "person", without more, in a statute does not include the Sovereign.[9]

There is no statute authorizing the United States to bring or prosecute an action to enjoin the officials of the State or the officials of the University of Mississippi to admit James H. Meredith as a student thereat. In the absence of such statute the United States could not bring or maintain such action for injunction. Their claim to have acted in a governmental capacity is as spurious

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7. 74 Stat. 90.

8. *U. S.* v. *Alabama*, 171 F. Supp. 720, 729, 267 F.2d 808 (Reversed on other grounds after this subsequent enactment of Congress, 363 U.S. 602).

9. As to Norris LaGuardia Act, *United States* v. *United Mine Works*, 330 U.S. 258;

As to Shermah Act, *United States* v. *Cooper Corp.*, 312 U.S. 600, 604;

As to a Municipal Corporation under the "Civil Rights" Act, *Monroe* v. *Pope*, 365 U.S. 167.

Cf. *Hague* v. *C.I.O.*, 307 U.S. 496, 514.

here as it would be if they went back into the business of strike breaking as they did in *Debs* despite the plain prohibition of statutes there.

It is therefore apparent, not only that the writ of injunction that is herein charged to have been disobeyed was not "brought or prosecuted in the name of or on behalf of the United States", but also equally apparent that, in the absence of a statute authorizing the bringing of such an action by the United States, any action brought for such an injunction could not be "brought or prosecuted in the name of or on behalf of the United States". Of course, there is no such statute authorizing the bringing or prosecution of such a suit by the United States.[10]

This Court has held in *Michaelson* v. *United States*,[11] that where the act charged as contempt constitutes a crime

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10. The prosecution has paid little heed to proper procedure elsewhere in this action. In fact, this prosecution was void in its inception because of the improper procedure followed in its origination. An action for criminal contempt could not lawfully be commenced as a part of No. 19475, styled *"James H. Meredith v. Charles Dickson Fair et al."* Such a criminal action could only be commenced under an action styled *"United States v. Ross R. Barnett et al.,"* or *"In re Ross R. Barnett et al."* However, here the prosecution attempted to commence this proceeding by filing its information of criminal contempt in a civil action (No. 19475) styled as a civil action—*"Meredith v. Fair et al."*

In *Gompers* v. *United States*, 233 U.S. 604, this Court ruled:

> "In the first place the petition was not entitled 'United States v. Samuel Gompers et al.' or 'In re Samuel Gompers et al.,' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, . . . He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. . . ."

11. 266 U.S. 42.

the right to trial by jury is mandatory. Hence, we say that the Defendants are entitled to a trial by jury in Jackson, Mississippi, under the provisions of Rule 18 of the Federal Rules of Criminal Procedure.

C

The United States Does Not Have an Option under the Statutes to Choose to Deny Defendants a Right to Trial by Jury

The Government admits that if this matter were before a District Court and if it were an order in an action which was not brought or prosecuted in the name of or on behalf of the United States, the defendants would be entitled to be tried by a jury as a matter of statutory right. We beg the Court then, to consider the following matters:

(1) The facts show that from beginning to end *Meredith* v. *Fair* was a civil law suit seeking personal redress for a claimed violation of the constitutional rights of an individual citizen. Congress has many times denied to the United States the requested right to bring such litigation, and the Justice Department is indeed now urging the Congress to vest it with such jurisdiction.

(2) At all times during this private litigation, Meredith was represented by competent and vigorous counsel who sought all possible orders to achieve Meredith's claimed and adjudicated personal rights. No substantial action was taken by the United States which was not promptly or had not been previously duplicated by the private litigant.

(3) The U. S. District Court acted promptly and correctly on every request made to it for action by the private litigant and by the prosecution, then acting in the guise of an "amicus curiae". Every assertion by the prosecution contrary to this state-

ment is both dehors the record in context and false in fact.

In matters of basic constitutional and statutory protection this court regards substance over form.[1] If the prosecution had not moved for a cumulative injunction and done so in an appellate court instead of allowing the private litigant to proceed in a court vested with statutory original jurisdiction, the specific provisions of 18 U.S.C. 402 would have pointedly settled the issue now before this Court. In the light of these matters, we submit the question certified could well be re-phrased in this manner:

> Can the United States deprive a person of a constitutional protection provided by Congress by intervening in private litigation, by by-passing of a District Court and requesting injunctive relief from a Court of Appeals?

With it thus phrased, the answer is obvious. When this Court looks to substance and not to form, it may readily see that this is precisely what happened in this very proceeding.

POINT III

An Affirmative Answer to the Question Certified Should Include a Direction Requiring the Court of Appeals to Certify This Case for Trial in the Appropriate District Court

The record in this case shows that the prosecution was not required to file their application for criminal con-

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1. *Weiss* v. *Stearns*, 256 U.S. 242, 254.

> ". . . when applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder, we must regard matters of substance and not mere form."

Cf. Gommillion v. *Lightfoot*, 364 U.S. 339.

tempt citation of Defendants in the Court of Appeals. The order did positively require the prosecution to proceed in accordance with Rule 42(b). This rule is exclusively a District Court rule.

In Title 18, U.S.C., §3771,[1] the Congress permitted this Court to make rules of practice *in the District Courts* covering proceedings "*prior* to and including verdict, or finding of guilty or not guilty". The only part of the Federal Rules of Criminal Procedure which relate to Courts of Appeal are those which are applicable to proceedings "*after* verdict or finding of guilt".[2] Thus, the Court's requirement of proceeding in accordance with Rule 42(b) was for a proceeding in a District Court.

We would further note that the order of November 15, 1962, contemplated a proceeding by the prosecution which would afford the Defendants "maximum procedural protection". Yet, the effect of the prosecution's proceeding before the Court of Appeals was the denial of a fundamental procedural protection to Defendants; namely, the *right* to have the proceedings reviewed by an appellate court. By originating this proceeding in the Court of Appeals, the Defendants are left only with the *privilege* of petitioning this Court for a *discretionary* review.

Since this Court has consistently held that the accused in a contempt proceeding is entitled to an impartial arbiter of fact[3] for the trial of alleged criminal contempt, it would certainly be most seemly and proper for this cause to be heard before a District Court having the proper venue, as required by the criminal rules.[4] Original jurisdiction

1. 73 Stat. 11.
2. 18 U.S.C., § 3772; 73 Stat. 11.
3. *In re Murchison*, *supra*, p. 17.
4. Rule 18.

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to hear and determine criminal offenses is vested exclusively in such District Courts.[5] The transfer of a contempt case to another court for trial is not without precedent.[6]

Such a certification to a District Court would most assuredly comport with sound judicial administration since such District Courts are best equipped to conduct such hearings. They already have ~~allies~~ and jury commissioners as well as the physical facilities of a trial courtroom in the district where the criminal act was allegedly committed. Most fundamentally, the remand to such a District Court best comports with the meaning and intent of the Constitution.[7]

CONCLUSION

Our civilization has decided, and justly so, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter. It takes its inquiry to men who do not know the law, but who must rely on their feel of things germane to the experiences of man collectively. When there is a library to be catalogued, a solar system to be discovered or a space ship to be placed in orbit, or any trifle of that kind, civilization seeks out its specialists and its experts. But, when it would discharge Liberty's vital business of determining the guilt or innocence of a human being charged with a violation of the law that could deprive him of his liberty, it collects twelve ordi-

5. 18 U.S.C. 3231; 62 Stat. 826.

6. *Houston & N. Tex. Motor Freight Lines, Inc.*, v. *Local 745, Int. Bro. Teamsters, etc., et al., supra*, p. 18.

7. Article III, Section 2, Clause 3, and the 6th Amendment.

nary men going about their usual avocations the same as was done by the founder of Christianity.

Respectfully submitted,

THE STATE OF MISSISSIPPI

By: JOE T. PATTERSON, *Attorney General of the State of Mississippi*

DUGAS SHANDS, *Assistant Attorney General of the State of Mississippi*

GARNER W. GREEN

JOSHUA GREEN

M. M. ROBERTS

FRED B. SMITH

MALCOLM B. MONTGOMERY

CHARLES CLARK

Special Assistant Attorneys General of the State of Mississippi

Address of Each:

New Capitol Building
Jackson, Mississippi

APPENDIX

APPENDIX

The Constitution of the United States:

The 8th Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unsual punishments inflicted."

The 9th Amendment:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained *by the people.*"

The 10th Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or *to the people.*"

United States Code Annotated, Title 18, Section 3285:

§ 3285. Criminal Contempt.

No proceeding for criminal contempt within section 402 of this title shall be instituted against any person, corporation or association unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act. June 25, 1948, c. 645, 62 Stat. 828.

United States Code Annotated, Title 18, Section 3692:

§ 3692. Jury trial for contempt in labor dispute cases.

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall en-

joy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehaviour, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

United States Code Annotated, Title 18, Section 3771:

§ 3771. Procedure to and including verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice and procedure with respect to any or all proceedings *prior to and including verdict, or finding of guilty or not guilty* by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States commissioners.

United States Code Annotated, Title 18, Section 3772:

§ 3772. Procedure after verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings *after verdict, or finding of guilt* by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States

Justice Black's dissent in Green v. U. S., 356 U.S., pp. 193-219:

MR. JUSTICE BLACK with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law.[1] In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, "perhaps, nearest akin to despotic power of any power existing under our form of government."[2] Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society. Therefore to me this case involved basic questions of the highest importanee far transcending its particular facts. But the specific facts do provide a striking example of how the great procedural safeguards erected by the Bill of Rights

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1. The term "summary proceeding" (or "summary trial") is ured in its ordinary sense to refer to a "form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury." 3 Bouvier's Law Dictionary (8th ed. 1914) 3182. Of course as the law now stands contempts committed in the presence of the judge may be punished without any hearing or trial at all, summary or otherwise. For a flagrant example see *Sacher* v. *United States*, 343 U.S. 1.

2. *State ex rel. Ashbaugh* v. *Circuit Court*, 97 Wis. 1, 8, 72 N.W. 193, 194-195.

are now easily evaded by the ever-ready and boundless expedients of a judicial decree and a summary contempt proceeding.

I would reject those precedents which have held that the federal courts can punish an alleged violation outside the courtroom of their decrees by means of a summary trial, at least as long as they can punish by severe prison sentences or fines as they now can and do.[3] I would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for "all criminal prosecutions." I am convinced that the previous cases to the contrary are wrong—wholly wrong for reasons which I shall set out in this opinion.

Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation. See, *e. g.*, *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Graves* v. *New York ex rel. O'Keefe*, 306

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3. The precedents are adequately collected in note 14 of the Court's opinion.

Much of what is said in this opinion is equally applicable to contempts committed in the presence of the court. My opposition to summary punishment for those contempts was fully set forth in my dissent in *Sacher* v. *United States*, 343 U. S. 1, 14.

U. S. 466; *Nye* v. *United States*, 313 U. S. 33.[4] Indeed the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so. See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (Brandeis, J., dissenting); Douglas, Stare Decisis, 49 Col. L. Rev. 735.

If ever a group of cases called for reappraisal it seems to me that those approving summary trial of charges of criminal contempt are the ones. The early precedents which laid the groundwork for this line of authorities were decided before the actual history of the procedures used to punish contempt was brought to light, at a time when "[w]holly unfounded assumptions about 'immemorial usage' acquired a factitious authority and were made the basis of legal decisions."[5] These cases erroneously

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4. "I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." Chief Justice Taney, *Passenger Cases*, 7 How. 283, 470 (dissenting opinion).

5. Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1011.

It also seems significant that the initial decisions by this Court actually upholding the power of the federal courts to punish contempts by summary process were not made until as late as the final decades of the last century, almost a full century after the adoption of the Constitution. Since that time the power has been vigorously challenged on a number of occasions. See, *e. g.*, *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425 (dissenting opinion); *Sacher* v. *United States*, 343 U. S. 1, 14 (dissenting opinion). Within the past few years there has been a tendency on the part of this Court to restrict the substantive scope of the

assumed that courts had always possessed the power to punish all contempts summarily and that it inhered in their very being without supporting their suppositions by authority or reason. Later cases merely cite the earlier ones in a progressive cumulation while uncritically repeating their assumptions about "immemorial usage" and "inherent necessity."[6]

No justified expectations would be destroyed by the course I propose. There has been no heavy investment in reliance on the earlier cases; they do not remotely lay down rules to guide men in their commercial or property affairs. Instead they concern the manner in which persons are to be tried by the Government for their alleged crimes. Certainly in this area there is no excuse for the perpetuation of past errors, particularly errors of great continuing importance with ominous potentialities. Apparently even the majority recognizes the need for some kind of reform by engrafting the requirement that punishment for contempt must be "reasonable"—that irrepressible, vague and delusive standard which at times threatens to engulf the entire law, including the Constitution itself, in a sea of judicial discretion.[7] But this trifling amel-

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contempt power to narrower bounds than had been formerly thought to exist. See, *e. g.*, *Nye* v. *United States*, 313 U. S. 33; *Bridges* v. *California*, 314 U. S. 252; *In re Michael*, 326 U. S. 224; *Caminer* v. *United States*, 350 U. S. 399. *Cf. In re Oliver*, 333 U. S. 257. In substantial part this is attributable to a deeply felt antipathy toward the arbitrary procedures now used to punish contempts.

6. Perhaps the classic example is the much criticized decision in *In re Debs*, 158 U. S. 564. For some of the milder comment see Lewis, A Protest Against Administering Criminal Law by Injunction—The Debs Case, 42 Am. L. Reg. 879; Lewis, Strikes and Courts of Equity, 46 Am. L. Reg. 1; Dunbar, Government by Injunction, 13 L. Q. Rev. 347; Gregory, Government by Injunction, 11 Harv. L. Rev. 487.

7. *E. g.*, see *Beauharnais* v. *Illinois*, 343 U. S. 250; *Perez* v. *Brownell*, *ante*, p. 44.

ioration does not strike at the heart of the problem and can easily come to nothing, as the majority's very approval of the grossly disproportionate sentences imposed on these defendants portends.

Before going any further, perhaps it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. See *United States* v. *United Mine Workers of America*, 330 U. S. 258, 330-332 (dissenting and concurring opinion). Instead, at stake here is the validity of a criminal conviction for disobedience of a court order punished by a long, fixed term of imprisonment. In my judgment the distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past transgressions is crucial, analytically as well as historically, in determining the permissible mode of trial under the Constitution.

Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in "judgment" on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to con-

centrate this much power in the hands of any officer of the state. No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence. Indeed if any other officer were presumptuous enough to claim such power I cannot believe the courts would tolerate it for an instant under the Constitution. Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, as well as others which need not be mentioned, undoubtedly led to the determination of those who formed our Constitution to fragment power, especially the power to define and enforce the criminal law, among different departments and institutions of government in the hope that each would tend to operate as a check on the activities of the others and a shield against their excesses thereby securing the people's liberty.

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused.[8] He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objec-

8. A series of recent cases in this Court alone indicates that the personal emotions or opinions of judges often become deeply involved in the punishment of an alleged contempt. See, e. g., *Fisher* v. *Pace*, 336 U. S. 155; *Sacher* v. *United States*, 343 U. S. 1; *Offutt* v. *United States*, 348 U. S. 11; *Nilva* v. *United States*, 352 U. S. 385; *Yates* v. *United States*, 355 U. S. 66.

tive, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison*, 349 U. S. 133, 136-137. Cf. *Chambers* v. *Florida*, 309 U. S. 227, 236-237; *Tumey* v. *Ohio*, 273 U. S. 510; *In re Oliver*, 333 U. S. 257.

The vices of a summary trial are only aggravated by the fact that the judge's power to punish criminal contempt is exercised without effective external restraint. First, the substantive scope of the offense of contempt is inordinately sweeping and vague; it has been defined, for example, as "any conduct that tends to bring the authority and administration of the law into disrespect or disregard."[9] It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law. Secondly, a defendant's principal assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that "the trial judge has not abused his dis-

9. Oswald, Contempt of Court (3d ed. 1911), 6.

cretion." But even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge. Finally, as the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of "reasonableness" now promulgated by the majority.

In my view the power of courts to punish criminal contempt by summary trial, as now exercised, is precisely the kind of arbitrary and dangerous power which our forefathers both here and abroad fought so long, so bitterly, to stamp out. And the paradox of it all is that the courts were established and are maintained to provide impartial tribunals of strictly disinterested arbiters to resolve charges of wrongdoing between citizen and citizen or citizen and state.

The Constitution and Bill of Rights declare in sweeping unequivocal terms that "The Trial of all Crimes . . . shall be by Jury," that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." As it may now be punished criminal contempt is manifestly a crime by every relevant test of reason or history. It was always a crime at common law punishable as such in the regular course of the criminal law.[10] It possesses all of the earmarks commonly attributed to a crime. A mandate of the Government has

10. See pp. A12-A23, *infra*.

allegedly been violated for which severe punishment, including long prison sentences, may be exacted—punishment aimed at chastising the violator for his disobedience.[11] As Mr. Justice Holmes irrefutably observed for the Court in *Gompers* v. *United States*, 233 U. S. 604, at 610-611: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way."[12]

This very case forcefully illustrates the point. After surrendering the defendants were charged with fleeing

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11. In accordance with established usage 18 U. S. C. § 1 defines a felony as any "offense punishable by death or imprisonment for a term exceeding one year." By this standard the offense of contempt is not only a crime, but a felony—a crime of the gravest and most serious kind.

Of course if the maximum punishment for criminal contempt were sufficiently limited that offense might no longer fall within the category of "crimes"; instead it might then be regarded, in the light of our previous decisions, as a "petty" or "minor" offense for which the defendant would not necessarily be entitled to trial by jury. See *District of Columbia* v. *Clawans*, 300 U. S. 617; *Callan* v. *Wilson*, 127 U. S. 540.

12. Cf. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392 ("Contempt of court is a specific criminal offence."). And see *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66-67; *Pendergast* v. *United States*, 317 U. S. 412, 417-418.

"Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt." Frankfurter and Greene, The Labor Injunction, 226.

from justice, convicted, and given lengthy prison sentences designed to punish them for their flight. Identical flight has now been made a statutory crime by the Congress with severe penalties.[13] How can it possibly be any more of a crime to be convicted of disobeying a statute and sent to jail for three years than to be found guilty of violating a judicial decree forbidding precisely the same conduct and imprisoned for the same term?

The claim has frequently been advanced that courts have exercised the power to try all criminal contempts summarily since time immemorial and that this mode of trial was so well established and so favorably regarded at the time the Constitution was adopted that it was carried forward intact, by implication, despite the express provisions of the Bill of Rights requiring a completely different and fairer kind of trial for "all crimes." The myth of immemorial usage has been exploded by recent scholarship as a mere fiction. Instead it seems clear that until at least the late Seventeenth or early Eighteenth Century the English courts, with the sole exception of the extraordinary and ill-famed Court of Star Chamber whose arbitrary procedures and gross excesses brought forth many of the safeguards included in our Constitution, neither had nor claimed power to punish contempts committed out of court by summary process. Fox, The History of Contempt of Court; Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042-1052; Beale, Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 161. Prior to this period such contempts were tried in the normal and regular course of the criminal law, including trial by jury.[14] After the Star Chamber was abolished

13. 18 U. S. C. § 3146.

14. One scholar has argued that even contempts in the face of the courts were tried by jury after indictment by grand jury

in 1641 the summary contempt procedures utilized by that odious instrument of tyranny slowly began to seep into the common-law courts where they were embraced by judges not averse to enhancing their own power. Still for decades the instances where such irregular procedures were actually applied remained few and far between and limited to certain special situations.

Then in 1765 Justice Wilmot declared in an opinion prepared for delivery in the Court of King's Bench (but never actually handed down) that courts had exercised the power to try all contempts summarily since their creation in the forgotten past. Although this bald assertion has been wholly discredited by the painstaking research of the eminent authorities referred to above, and even though Wilmot's opinion was not published until some years after our Constitution had been adopted, nor cited as authority by any court until 1821, his views have nevertheless exerted a baleful influence on the law of contempt both in this country and in England. By the middle of the last century the English courts had come to accept fully his thesis that they inherently possessed power to punish all contempts summarily, in or out of court. Yet even then contempts were often punished by the regular criminal procedures so that this Court could report as late as 1913 that they were still preferably tried in that manner. *Gompers* v. *United States*, 233 U. S. 604, 611.[15]

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until the reign of Elizabeth I. Solly-Flood, Prince Henry of Monmouth and Chief Justice Gascoign, 3 Transactions of the Royal Historical Society (N. S.) 47. Although agreeing that contempts *in facie* were often tried by a jury up to and beyond this period, Fox takes the view that such contempts were also punishable by summary procedures from the early common law.

15. In passing it is interesting to note that even Wilmot felt obliged to bolster his position by pointing to the fact that a de-

The Government, relying solely on certain obscure passages in some early law review articles by Fox, contends that while the common-law courts may not have traditionally possessed power to punish all criminal contempts without a regular trial they had always exercised such authority with respect to disobedience of their decrees. I do not believe that the studies of Fox or of other students of the history of contempt support any such claim. As I understand him, Fox reaches precisely the opposite conclusion. In his authoritative treatise, expressly written to elaborate and further substantiate the opinions formed in his earlier law review comments, he states clearly at the outset:

> "The first of [this series of earlier articles], entitled *The King* v. *Almon*, was written to show that in former times the offence of contempt committed out of court was tried by a jury in the ordinary course of law and not summarily by the Court as at present [1927]. The later articles also bear upon the history of the procedure in matters of contempt. Further inquiry confirmed the opinion originally formed with regard to the trial of contempt and brought to light a considerable amount of additional evidence which, with the earlier matter, is embodied in the following chapters. . . ."[16]

Then in summarizing he asserts that strangers to court proceedings were never punished except by the ordinary processes of the criminal law for contempts committed out

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fendant under a notion then prevalent, could exonerate himself from a charge of contempt by fully denying the charges under oath. In this event he could only be prosecuted for false swearing in which case he was entitled, as Wilmot elaborately observes, to trial by jury. See Curtis and Curtis, The Story of a Notion in the Law of Criminal Contempt, 41 Harv. L. Rev. 51.

16. Fox, The History of Contempt of Court, VII.

of the court's presence until some time after the dissolution of the Star Chamber; he immediately follows with the judgment that parties were governed by the same general rules that applied to strangers.[17] Of course he recognizes the antiquity of the jurisdiction of courts to enforce their orders by conditional confinement, but such coercion, as pointed out before, is obviously something quite different from the infliction of purely punitive penalties for criminal contempt when compliance is no longer possible.

Professors Frankfurter and Landis in their fine article likewise unequivocally declare:

> ". . . the Clayton Act [providing for jury trial of certain charges of criminal contempt] does nothing new. It is as old as the best traditions of the common law. . . .
>
> "Down to the early part of the eighteenth century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court were dealt with by the ordinary course of law, *i. e.*, tried by jury, except when the offender confessed or when the offense was committed 'in the actual view of the court.' . . .
>
> . . . . . .
>
> "[U]ntil 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process."[18]

And Professor Beale in his discussion of the matter concludes:

> "As early as the time of Richard III it was said that the chancellor of England compels a party against

17. *Id.*, at 116-117. See also, *id.*, at 3-4, 13, 54-55, 71-72, 89.

18. Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042, 1046.

whom an order is issued by imprisonment; and a little later it was said in the chancery that 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him to prison till he obey, and that is all the chancellor can do.' This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king. Down to within a century [Beale was writing in 1908] it was very doubtful if the chancellor could under any circumstances inflict punishment for disobedience of a decree. . . . In any case the contempt of a defendant who had violated a decree in chancery could be purged by doing the act commanded and paying costs; . . . .

. . . . . .

"Where the court inflicts a definite term of imprisonment by way of punishment for the violation of its orders, the case does not differ, it would seem, from the case of criminal contempt out of court, and regular process and trial by jury should be required."[19]

In brief the available historical material as reported and analyzed by the recognized authorities in this field squarely refutes the Government's insistence that disobedience of a court order has always been an exception punishable by summary process. Insofar as this particular case is concerned, the Government frankly concedes that it cannot point to a single instance in the entire course of Anglo-American legal history prior to this prosecution and two related contemporary cases where a defendant has been punished for criminal contempt by summary trial after fleeing from court-ordered imprisonment.[20]

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19. Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 161, 169-170, 174.

20. See *United States* v. *Thompson*, 214 F. 2d 545; *United States* v. *Hall*, 198 F. 2d 726.

Those who claim that the delegates who ratified the Constitution and its contemporaneous Amendments intended to exempt the crime of contempt from the procedural safeguards expressly established by those great charters for the trial of "all crimes" carry a heavy burden indeed. There is nothing in the Constitution or any of its Amendments which even remotely suggests such an exception. And as the Government points out in its brief, it does not appear that there was a word of discussion in the Constitutional Convention or in any of the state ratifying conventions recognizing or affirming the jurisdiction of courts to punish this crime by summary process, a power which in all particulars is so inherently alien to the method of punishing other public offenses provided by the Constitution.

In the beginning the contempt power with its essentially arbitrary procedures was a petty, insignificant part of our law involving the use of trivial penalties to preserve order in the courtroom and maintain the authority of the courts.[21] But since the adoption of the Constitution it has undergone an incredible transformation and growth, slowly at first and then with increasing acceleration, until it has become a powerful and pervasive device for enforcement of the criminal law. It is no longer the same comparatively innocuous power that it was. Its summary procedures have been pressed into service for

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21. Although records of the colonial era are extremely fragmentary and inaccessible apparently such contempts as existed were not the subject of major punishment in that period. From the scattered reported cases it appears that alleged offenders were let off after an apology, a reprimand or a small fine or other relatively slight punishment. I have found no instance where anyone was unconditionally imprisoned for even a term of months, let alone years, during that era when extremely harsh penalties were otherwise commonplace.

such far-flung purposes as to prevent "unlawful" labor practices, to enforce the prohibition laws, to secure civil liberties and now, for the first time in our history, to punish a convict for fleeing from imprisonment.[22] In brief it has become a common device for by-passing the constitutionally prescribed safeguards of the regular criminal law in punishing public wrongs. But still worse, its subversive potential to that end appears to be virtually unlimited. All the while the sentences imposed on those found guilty of contempt have steadily mounted, until now they are even imprisoned for years.

I cannot help but believe that this arbitrary power to punish by summary process, as now used, is utterly irreconcilable with first principles underlying our Constitution and the system of government it created—principles which were uppermost in the minds of the generation that adopted the Constitution. Above all that generation deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state. A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the Fifth,

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22. The following are merely random samples of important and far-reaching federal regulatory Acts now in effect under which a violation of any provision of the Act is not only a statutory crime punishable as such but also may be enjoined at the Government's request and punished as a criminal contempt by summary process if the injunction is disobeyed. Securities Exchange Act, 48 Stat. 900, 15 U. S. C. § 78u; Natural Gas Act, 52 Stat. 832, 15 U. S. C. § 717s; Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. § 217; Atomic Energy Act, 68 Stat. 959, 42 U. S. C. (Supp. IV) § 2280; Federal Communications Act, 48 Stat. 1092, 47 U. S. C. § 401; Defense Production Act of 1950, 64 Stat. 817, 50 U. S. C. App. § 2156.

Sixth, Seventh and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges, especially with regard to the procedures used for the trial of crimes.

As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men.[23] Witness the fierce opposition of the colonials to the courts of admiralty in which judges instead of citizen juries were authorized to try those charged with violating certain laws.[24] The same zealous determination to protect jury trial dominated the state conventions which ratified the Constitution and eventually led to the solemn reaffirmation of that mode of trial in the Bill of Rights—not only for all criminal prosecutions but for all civil causes involving $20 or more. See 2 Story, Commentaries on the Constitution (5th ed. 1891), §§ 1763-1768. I find it difficult to understand how it can be maintained that the same people who manifested such great concern for trial by jury as to explicitly embed it in the Constitution for every $20 civil suit could have intended that this cherished method of trial should not be available to those threatened with long imprisonment for the crime of contempt. I am confi-

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23. As early as 1765 delegates from nine colonies meeting in New York declared in a Declaration of Rights that trial by jury was the "inherent and invaluable right" of every colonial. 43 Harvard Classics 147, 148.

24. In 1775 Jefferson protested: "[Parliament has] extended the jurisdiction of the courts of admiralty beyond their ancient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the decision arbitrary decision [*sic*] of a single and dependent judge." 2 Journals of the Continental Congress (Ford ed.) 132.

dent that if there had been any inkling that the federal courts established under the Constitution could impose heavy penalties, as they now do, for violation of their sweeping and far-ranging mandates without giving the accused a fair trial by his fellow citizens it would have provoked a storm of protest, to put it mildly. Would any friend of the Constitution have been foolhardy enough to take the floor of the ratifying convention in Virginia or any of a half dozen other States and even suggest such a possibility?[25]

As this Court has often observed, "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning," *United States* v. *Sprague*, 282 U. S. 716, 731; ". . . constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption," *Lake County* v. *Rollins*, 130 U. S. 662, 671. Cf. Mr. Justice Holmes in *Eisner* v. *Macomber*, 252 U. S. 189, 219-220 (dissenting opinion). It is wholly beyond my comprehension how the generality of laymen, or for that matter even thoughtful lawyers, either at the end of the Eighteenth

25. Although Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, authorized the federal courts to punish contempts "in any cause or hearing before the same," it did not, as this Court has pointed out, define what were contempts or prescribe the method of punishing them. *Savin, Petitioner*, 131 U. S. 267, 275. Section 17, which contains a number of other provisions, appears to have been a comparatively insignificant provision of the judicial code enacted by the Congress without material discussion in the midst of 34 other sections, many of which were both extremely important and highly controversial.

Century or today, could possibly see an appreciable difference between the crime of contempt, at least as it has now evolved, and other major crimes, or why they would wish to draw any distinction between the two so far as basic constitutional rights were concerned.

It is true that Blackstone in his Commentaries incorporated Wilmot's erroneous fancy that at common law the courts had immemorially punished all criminal contempts without regular trial. Much ado is made over this by the proponents of summary proceedings. Yet at the very same time Blackstone openly classified and uniformly referred to contempt as a "crime" throughout his treatise, as in fact it had traditionally been regarded and punished at common law.[26] Similarly, other legal treatises available in this country during the period when the Constitution was established plainly treated contempt as a "crime."[27] It seems to me that if any guide to the meaning of the Constitution can be fashioned from the circulation of the Commentaries and these other legal authorities through the former colonies (primarily among lawyers and judges) it is at least as compatible with the view that the Constitution requires a jury trial for criminal contempts as with the contrary notion.

But far more significant, our Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive govern-

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26. See, *e. g.*, 4 Blackstone's Commentaries 1-6, 119-126, 280-287. Also pertinent here is Blackstone's oft-quoted laudation of trial by jury "as the glory of the English law. . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 *id.*, at 379.

27. See, *e. g.*, 1 Hawkins, Pleas of the Crown (6th ed. 1787), 87.

mental practice then tolerated, or thought to be, in England. Cf. *Bridges* v. *California*, 314 U. S. 252, 263-268. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified. As summarized by one historian:

> "The Revolutionary War made everything connected with the law of England distasteful to the people at large. The lawyers knew its value: the community did not. Public sentiment favored an American law for America. It was quickened by the unfriendly feeling toward the mother country which became pronounced toward the close of the eighteenth century and culminated in the War of 1812."[28]

Although the bench and bar, particularly those who were adherents to the principles of the Federalist Party, often favored carrying forward the common law to the fullest possible extent popular sentiment was overwhelmingly against them.[29]

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28. Baldwin, The American Judiciary, 14.

"After the Revolution the public was extremely hostile to England and to all that was English and it was impossible for the common law to escape the odium of its English origin." Pound, The Spirit of the Common Law, 116. And see Warren, History of the American Bar, 224-228.

29. In 1804 the Chief Justice and two Associate Justices of the Pennsylvania Supreme Court were actually impeached for sentencing a person to jail for contempt. In part the impeachment

Apologists for summary trial of the crime of contempt also endeavor to justify it as a "necessity" if judicial orders are to be observed and the needful authority of the courts maintained. "Necessity" is often used in this context as convenient or desirable. But since we are dealing with an asserted power which derogates from and is fundamentally inconsistent with our ordinary, constitutionally prescribed methods of proceeding in criminal cases, "necessity," if it can justify at all, must at least refer to a situation where the extraordinary power to punish by summary process is clearly indispensable to the enforcement of court decrees and the orderly administration of justice. Or as this Court has repeatedly phrased it, the courts in punishing contempts should be rigorously restricted to the "least possible power adequate to the end proposed." See, *e. g., In re Michael*, 326 U. S. 224, 227.

Stark necessity is an impressive and often compelling thing, but unfortunately it has all too often been claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. As one of our great lawyers, Edward Livingston, observed in proposing the complete abolition of summary trial of criminal contempts:

> "Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation."[30]

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rested on the feeling that punishment of contempt by summary process was an arbitrary practice of the common law unsuited to this country. While the Justices were narrowly acquitted this apparently only aggravated popular antagonism toward the contempt power. See 3 McMaster, History of the People of the United States (1938 ed.), 153-162.

30. 1 Works of Edward Livingston 264.

When examined in closer detail the argument from "necessity" appears to rest on the assumption that the regular criminal processes, including trial by petit jury and indictment by grand jury, will not result in conviction and punishment of a fair share of those guilty of violating court orders, are unduly slow and cumbersome, and by intervening between the court and punishment for those who disobey its mandate somehow detract from its dignity and prestige. Obviously this argument reflects substantial disrespect for the institution of trial by jury, although this method of trial is—and has been for centuries—an integral and highly esteemed part of our system of criminal justice enshrined in the Constitution itself. Nothing concrete is ever offered to support the innuendo that juries will not convict the same proportion of those guilty of contempt as would judges. Such evidence as is available plus my own experience convinces me that by and large juries are fully as responsible in meting out justice in criminal cases as are the judiciary.[31] At the same time, and immeasurably more important, trial before a jury and in full compliance with all of the other protections of the Bill of Rights is much less likely to result in a miscarriage of justice than summary trial by the same judge who issued the order allegedly violated.

Although some are prone to overlook it, an accused's right to trial by a jury of his fellow citizens when charged with a serious criminal offense is unquestionably one of his most valuable and well-established safeguards in this country.[32] In the words of Chief Justice Cooley: "The

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31. See, e. g., Sunderland, Trial by Jury, 11 Univ. of Cin. L. Rev. 119, 120; Hartshorne, Jury Verdicts: A Study of Their Characteristics and Trends, 35 A. B. A. J. 113.

32. See *Ex parte Milligan*, 4 Wall. 2, 122-123; *Thompson* v. *Utah*, 170 U. S. 343, 349-350; *Dimick* v. *Schiedt*, 293 U. S. 474, 485-486; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16.

law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." *People* v. *Garbutt*, 17 Mich. 9, 27. Trial by an impartial jury of independent laymen raises another imposing barrier to oppression by government officers. As one of the more perceptive students of our experiment in freedom keenly observed, "The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government." 1 De Tocqueville, Democracy in America (Reeve trans., 1948 ed.), 282. The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens.

It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning

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18-19; The Federalist, No. 83 (Hamilton); 2 Story, Commentaries on the Constitution of the United States, 544; 2 Wilson's Works (Andrews ed. 1896) 222.

our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. But even setting this dominant consideration to one side, what compelling necessity is there for special dispatch in *punishing* criminal contempts, especially those occurring beyond the courtroom? When the desired action or inaction can no longer be compelled by coercive measures and all that remains is the punishment of past sins there is adequate time to give defendants the full benefit of the ordinary criminal procedures. As a matter of fact any slight delay involved might well discourage a court from resorting to hasty, unnecessary measures to chastise suspected disobedience. I believe that Mr. Justice Holmes, speaking for himself and Mr. Justice Brandeis, took his stand on invulnerable ground when he declared that where "there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425-426 (dissenting opinion).[33]

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33. Again this case aptly demonstrates the point. Here the defendants surrendered several years after they had ordered to apear and serve their sentences. There was no reason for urgent action to punish them for their absence, there was ample time to impanel a jury and prosecute them in the regular manner. As a mattet of fact almost a month and a half did elapse between their surrender and trial.

Alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held,

For almost a half century the Clayton Act has provided for trial by jury in all cases of criminal contempt where the alleged contempt is also a violation of a federal criminal statute.[34] And since 1931 the Norris-LaGuardia Act has granted the same right where a charge of criminal contempt is based on the alleged violation of an injunction issued in a labor dispute.[35] Notwithstanding the forebodings of calamity and destruction of the judicial system which preceded, accompanied and briefly followed these reforms, there is no indication whatever that trial by jury has impaired the effectiveness or authority of the courts in these important areas of the law. Furthermore it appears that in at least five States one accused of the crime of contempt is entitled, at least to some degree, to demand jury trial where the alleged contempt occurred beyond the courtroom.[36] Again, I am unable to find any evidence, or even an assertion, that judicial orders have been stripped of their efficacy, or courts deprived of their requisite dignity by the intervention of the jury in those States. So far as can be discerned the wheels of justice have not ground to a halt or even noticeably slowed. After all the English courts apparently got on with their

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witnesses must be called, and evidence taken in any event. Cf. *Cooke v. United States*, 267 U. S. 517. And often, as in this case, crucial facts are in close dispute.

I might add, at this point, that MR. JUSTICE BRENNAN has forcefully demonstrated, in my judgment, that the evidence in this case was wholly insufficient to prove a crucial element of the offense charged—namely, notice of the surrender order.

34. 38 Stat. 738-739, as amended, 18 U. S. C. §§ 402, 3691.

35. 47 Stat. 72, 18 U.S.C. § 3692.

36. Arizona, Rev. Stat. Ann., 1956, § 12-863; Georgia, Code Ann., 1935, § 24-105; Kentucky, Rev. Stat. Ann., 1955, § 432.260; Oklahoma, Stat. Ann., 1936, Tit. 21, § 567; Pennsylvania, Purdon's Stat. Ann., 1930 (Cum. Ann. Pocket Pt. 1957), Tit. 17, § 2047.

business for six or seven centuries without any general power to try charges of criminal contempt summarily.

I am confident that in the long run due respect for the courts and their mandates would be much more likely if they faithfully observed the procedures laid down by our nationally acclaimed charter of liberty, the Bill of Rights.[37] Respect and obedience in this country are not engendered—and rightly not—by arbitrary, and autocratic procedures. In the end such methods only yield real contempt for the courts and the law. The classic example of this is the use and abuse of the injunction and summary contempt power in the labor field. The federal courts have still not recovered from the scars inflicted by their intervention in that area where Congress finally stepped in and preserved the right of jury trial to all those charged with the crime of contempt.

In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is con-

37. See Brown, Whence Come These Sinews? 12 Wyo. L. J. 22.

cerned. There is no valid reason why they should be singled out for an extraordinary and essentially arbitrary mode of enforcement. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth. In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 107

UNITED STATES OF AMERICA,

vs.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AMICUS CURIAE FOR THE STATE OF MISSISSIPPI

JOE T. PATTERSON,
Attorney General of the State of Mississippi,
New State Capitol Building,
Jackson, Mississippi.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030